

THE CONFLICTUAL CORE OF GLOBAL TAX COOPERATION

*Shu-Yi Oei** & *Diane M. Ring***

ABSTRACT

It is widely argued that the world is in a new and distinctive era of global tax cooperation, as evidenced by the launch of a sweeping multilateral tax reform project spearheaded by the OECD and G20 to confront tax base erosion and profit shifting (“BEPS”). This Article argues, however, that this cooperation-centric account is overstated and masks fundamental conflicts between developing and developed countries’ interests, conflicts that have recently culminated in a vote to shift the location of the reform work to the United Nations. This Article also argues that these conflicts constitute more than a random mélange of objections from losing parties in negotiations but instead reflect a coherent and unified set of developing country-centered concerns that extend far beyond tax policymaking.

This Article’s highlights the conflictual elements inherent in the OECD/G20 BEPS project and presents an interpretative framework through which developing country-centered criticisms and their likely implications can be analyzed and understood. Fundamentally, these criticisms reflect concerns about the wide historical gulf in power and resources between developing and developed countries and how the BEPS reforms fail to address, and may even exacerbate, that gulf. Meanwhile, defenders of the BEPS reforms have largely missed this crux of the criticisms, focusing instead on the project’s incremental short-term benefits for *inter*-developing country tax competition.

Our interpretation of these deep conflicts at the heart of contemporary global tax reform has important implications for accurately describing the state of asserted global tax cooperation and for appreciating both its promise and its risks.

* David T. Zhang Professor of Law, Duke Law School.

** Professor of Law & Carney Scholar, Boston College Law School.

We are grateful to Heather Field, Monica Iyer, Mitchell Kane, Odette Lienau, Alex Raskolnikov, James Repetti, Stephen Shay, Natalya Shnitser, Aziz Rana, Richard Schmalbeck, Larry Zelenak, and the participants of the 2024 Columbia law School Tax Policy Workshop, the 2024 Duke Law School Tax Policy Workshop, 2024 Critical Tax Theory Workshop, the 2024 AMT/EITC Conference, and the 2024 Boston College Faculty Workshop for valuable feedback.

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INTRODUCTION

It is widely argued that the world is in a new and distinctive era of global tax cooperation, evidenced by the launch of a sweeping multilateral tax reform project spearheaded by the OECD and G20.¹ Since 2013, this global tax reform project—often referred to as the “OECD/G20 BEPS project”—has sought to confront the tax base erosion and profit shifting (“BEPS”) behaviors of multinational enterprises (or “MNEs”) and the threat these behaviors pose to countries’ tax revenues. Under its auspices, over 140 countries, including many developing countries, have committed to work together to combat BEPS and to reform their national tax policies to this end. The OECD/G20 BEPS project is often lauded as a sea change in global tax cooperation, not least because of its unprecedented inclusion of previously marginalized developing countries in global tax negotiations.² Even those critical of the project regard it as a milestone in multilateral cooperation.³ This Article argues, however, that the dominant, cooperation-centric account is overstated and masks fundamental conflicts between developing and developed countries interests, conflicts that have recently culminated in a vote to shift the location of global tax reform work to the United Nations (“UN”). Moreover, we also argue that these conflicts constitute more than a

¹ See generally Rasmus Corlin Christensen and Martin Hearson, “The New Politics of Global Tax Governance: Taking Stock a Decade after the Financial Crisis,” *Review of International Political Economy* 26, no. 5 (September 2019):1068–88, <https://doi.org/10.1080/09692290.2019.1625802>; Ruth Mason, “The Transformation of International Tax,” *American Journal of International Law* 114, no. 3 (July 2020):353–402, <https://doi.org/10.1017/ajil.2020.33>; Rebecca M. Kysar, “The Global Tax Deal and the New International Economic Governance,” SSRN Scholarly Paper (Rochester, NY, May 16, 2024), <https://papers.ssrn.com/abstract=4831166>.

² See, e.g., Tsilly Dagan, “Globe: The Potential Costs Of Cooperation,” *Intertax* 51, no. Issue 10 (October 2023): 638–49, <https://doi.org/10.54648/TAXI2023059> (“new tax deal is certainly an impressive accord of cooperation and a major accomplishment for the OECD”); Mason, *supra* note 1 at 352 (arguing BEPS “reflected . . . and operationalized meaningful changes in the participants, agenda, institutions, norms, and legal instruments of international tax” and “BEPS opened international tax to the G20, bringing a much-needed emerging-economy perspective to international tax.”); Allison Christians and Laurens van Apeldoorn, *Tax Cooperation in an Unjust World* (Oxford University Press, 2021) (noting that BEPS cooperation has moved international tax in valuable directions); Stephanie Soong, “Global Tax Reform Deal a ‘Stunning Achievement,’ Clausing Says,” *Tax Notes Today International* 236-2 (Dec. 10, 2021) (U.S. Treasury deputy assistant characterizing the BEPS project as “really a stunning achievement. . . what many have called the most significant economic agreement of the entire century so far.”); “Summers Calls OECD Pact a ‘Huge Triumph’ for Foreign Policy,” June 19, 2024, <https://www.bloomberg.com/news/videos/2021-10-08/summers-calls-oecd-pact-a-huge-triumph-for-foreign-policy> (quoting then U.S.-Treasury Secretary: “the BEPS two-pillar tax deal is the most important global economic agreement of the 21st century so far.”); Kysar, *supra* note 1.

³ See, e.g. Dagan, *supra* note 2; Christians & Apeldoorn, *supra* note 2.

random mélange of objections from losing parties in negotiations. Once closely examined, they reveal a coherent and unified set of concerns underlying developing country-focused objections, concerns that likely reverberate far beyond tax policymaking. This Article’s contribution is to highlight the conflictual elements inherent in the OECD/G20 BEPS project and to present an interpretative framework through which developing country-centered criticisms of the project, and the likely consequences and implications of those criticisms, can be analyzed and understood. In doing so, we do not claim to be speaking for or on behalf of developing countries but rather offer an interpretation based on our assessment of ongoing commentary regarding reactions to the BEPS reforms to date.

Some background information helps illuminate our contribution:

In 2013, the OECD, at the charge of the G20, created a multilateral tax reform project to address the tax base erosion and profit shifting behaviors of MNEs more effectively.⁴ This project targeted the aggressive cross-border tax avoidance behaviors of MNEs, which had surfaced following the 2008 financial crisis, leading to public outcry. To enable more countries to participate, the OECD established the “BEPS Inclusive Framework” (“IF”) in 2016, and as of May 2024, over 145 countries had joined this Inclusive Framework.⁵ The current phase of the BEPS project has involved a substantively transformational reform comprising two “pillars”: one addressing the challenges posed by the digital economy (“Pillar One”), and the other imposing a global minimum tax on large multinationals (“Pillar Two”).⁶ 136 countries agreed to the two-pillar solution in October 2021,⁷ and in December 2021, the Inclusive Framework released Model Global Anti-Base Erosion (“GloBE”) rules setting forth a “common approach” for implementing Pillar Two.⁸

⁴ “Base Erosion and Profit Shifting - OECD BEPS,” accessed June 19, 2024, <https://www.oecd.org/tax/beps/>.

⁵ “Members of the OECD/G20 Inclusive Framework on BEPS”, OECD, accessed June 19, 2024, <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (as of 28 May 2024).

⁶ “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,” OECD, <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (Oct. 8, 2021) [hereinafter, “Two-Pillar Statement”].

⁷ *Id.*; OECD, “Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (October 2021), 17, <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>. Agreeing countries included many, but not all, IF member countries.

⁸ OECD, *Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (Paris: Organisation for Economic Co-operation and Development, 2021), <https://doi.org/10.1787/782bac33-en>.

There has been significant criticism of the BEPS project from developing country perspectives, raising concerns regarding distributional effects, regime design, process shortcomings, and other matters. The existence of these critiques is well known, but defenders of the OECD's work have downplayed their seriousness by pointing to concessions made for developing countries and the ways reform will benefit them.⁹ It is not an overstatement to say that at times, the sides have appeared to be talking past each other.

This Article argues that these complaints are more consistent and unified than most commentators have appreciated. Our analysis necessarily focuses on Pillar Two, in part because (as of June 2024) Pillar Two is much further along than Pillar One, *and* because the overall tax revenue impact of Pillar Two far exceeds that of Pillar One.¹⁰ While Pillar One might plausibly reallocate some MNE profits to certain developing countries, such corporate tax revenue impact is far outstripped by revenue gains from Pillar Two. Moreover, work on Pillar One has somewhat stalled, and the possibility of future Pillar One revenues does not moot developing countries' overall dissatisfaction with the BEPS reforms.

We argue that developing country-centered complaints fundamentally challenge the formation and maintenance of a historically wide economic and power gulf between developed countries and the rest of the world and the long-standing world-system dynamics that have produced this gulf. The complaints reflect worries that the BEPS reforms will perpetuate and widen this gulf through Pillar Two's uneven benefits and burdens for developing vs. developed countries. For example, Pillar Two disadvantages tax incentives commonly used by developing countries but leaves untouched some powerful fiscal and investment incentives regularly used by developed countries.¹¹

[hereinafter "Pillar Two Model Rules"].

⁹ See, e.g., Stephanie Soong, "Nigeria Wants Global Tax Deal Changes, Finance Minister Says," *Tax Notes International* 109:504-05 (Jan. 23, 2023) ("OECD Secretary-General Mathias Cormann defended the deal, saying that billions in extra revenue are at stake. 'Will everybody unanimously say this is the perfect thing and the best thing since sliced bread? No,' he said. 'But is it better than what we currently have? Substantially better? Yes.'"); see also David Bradbury et al., "Economic Impact Assessment of the Two-Pillar Solution: Revenue Estimates for Pillar One and Pillar Two" (18 Jan. 2023) at 7, 30-33 (detailing changes to Pillars One and Two that "benefit low-income jurisdictions" and reporting revised estimated revenue gains). *Id.* at 26 (showing "higher [Pillar One] revenue gains for low and middle-income jurisdictions"), accessed June 19, 2024, <https://web.archive.org/2023-01-18/649393-economic-impact-assessment-presentation-january-2023.pdf>; "Global Anti-Base Erosion Model Rules (Pillar Two): Frequently Asked Questions," OECD, accessed June 19, 2024, <https://www.oecd.org/tax/beps/faqs-on-model-globe-rules.pdf> (discussing benefits for developing countries) [hereinafter Pillar Two FAQs].

¹⁰ See *infra* Part I.A.3.

¹¹ See, e.g., Mindy Herzfeld, "Pillar 2, State Aid, and Industrial Policy" *Tax Notes*

These concerns carry heightened weight given geofragmentation, shifting geopolitical alignments, and the developed world's inward turn away from globalization, all of which may negatively impact the flows of foreign investment to the developing world.¹²

In fact, the concerns about the wide gulf are serious enough that we consider it likely that some countries would object to the BEPS reforms even if they were to generate increased tax revenues for all countries in the world. If (as is projected to happen) the distribution of such increased revenues tilts in favor of developed countries, the mere fact of revenue gains for all countries would not necessarily alleviate developing country concerns. That revenue distribution would maintain and perhaps even widen the already wide gulf, particularly after considering foreign investment effects and foregone opportunity costs.

We also argue that common defenses of Pillar Two and the global tax project have largely missed the crux of the criticisms: Many of these defenses emphasize how the BEPS reforms alleviate tax competition *among* developing countries. What the defenses underappreciate is that developing country criticisms are largely focused on the wide gap *between* developed and developing countries and on how the reforms do not close, and may in fact intensify, that gap. The defenses also underscore the incremental new benefits (e.g., additional tax revenue) that the reforms will generate for developing countries, while granting little attention to the significant and longstanding tax problems that the reforms ignore but whose resolution would likely generate greater benefits for developing countries.

Our conflict- and developing country-focused interpretation is supported by and sheds interpretive light on recent events: Over a decade after the BEPS project's creation, the strongly held objections of many developing countries have recently spilled over in the form of explicit and actionable calls to relocate the project away from the OECD (widely viewed as representing rich-country interests) to the UN (regarded as more hospitable to developing country priorities). Understanding the deep and longstanding conflicts at the heart of global tax "cooperation" helps us better contextualize this move.

This Article's analysis carries important implications. First, our analysis illuminates the thinking behind, but also the ultimate limitations of, *both* OECD/G20-led global tax reform *and* the proposed UN move. The

International 112:329-33 (Oct. 16, 2023) (arguing these strategies must be addressed).

¹² See, e.g., Mindy Herzfeld, "The Perils of Pillar 2," *Tax Notes International* 106: 1119-1123 (May 30, 2022) ("it appears... as if the OECD is trying to solve yesterday's problem. The trend on the horizon is not increasing globalization, but a retreat from it"... "mending the damage caused by hyper-globalization will require refocusing the global economy to serve domestic economic and social goals, rather than the other way around" (citations omitted)).

underlying distributional politics of the BEPS project make it unlikely that it will ever fully embrace the developing-developed country gulf as its core priority. Yet, a shift of venue alone will not necessarily yield the outcomes developing countries seek. A move to the UN will not solve the underlying power dynamics that gave rise to the fundamental conflicts, and buy-in from powerful countries, including the United States and the European Union, would still be required. Moreover, the wide gulf is not simply the product of tax policy, and tax policy by itself is likely insufficient to cure it. That said, developing country efforts to re-center the global tax conversation may mark a broader shift towards meeting this larger goal.

Second, our analysis offers guidance for how global coordination projects more broadly should be evaluated. The global tax project may seem like an example of successful international cooperation, in stark contrast with the geopolitical fragmentation and global coordination failures occurring in other arenas.¹³ But our analysis casts doubt on this characterization. There may be good reasons to highlight the cooperative dimensions of global projects, and there may even be some agreement about the nature of the problem (in this case, dissatisfaction with how MNEs are taxed). But a narrative that fails to acknowledge the limits of the cooperation story risks minimizing the conflictual, and possibly coercive, power-based dynamics underlying the purported cooperation.¹⁴ This failure can lead to an underappreciation of serious fractures and, ultimately, to a project's collapse.

In Part I, we describe the OECD/G20 global tax reform and evaluate developing country participation. In Part II, we summarize key criticisms from developing country standpoints and the main responses by the BEPS project's defenders, focusing on Pillar Two. Part III discusses the wide, historically constituted gulf between developing and developed countries, focusing on overall economic disparities, differences in tax systems and tax incentives, and process-based and positional differences in global tax and other international negotiations. Part IV shows that developing country-focused complaints have largely been grounded in this wide gulf and on how Pillar Two and other BEPS reforms have treated developing countries unfairly in light, and because, of the gulf. By contrast, defenses of the OECD's work have reiterated the reforms' incremental benefits and how they help developing countries compete vis-à-vis each other, while ignoring the

¹³ See generally Kysar, *supra* note 1.

¹⁴ See Shu-Yi Oei, "World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership," *Yale Journal of International Law* 47, no. 2 (2022): 199–246.; see also generally Steven Lukes, *Power: A Radical View* (Hampshire: Palgrave Macmillan 2005); Contemporary Sociological Theory (2022):186-95 (Craig Calhoun et al, eds.); Sherry Arnstein, "A Ladder Of Citizen Participation," *Journal of the American Institute of Planners* 35, no. 4 (1969): 216-24.

developing-developed country gulf.¹⁵ Part IV also examines other analytical payoffs of the wide-gulf perspective. Finally, Part V discusses normative implications.

I. THE OECD/G20 GLOBAL TAX REFORM PROJECT

This Part provides background on the global tax project and the involvement of developing countries.

A. Background: The BEPS Project

The OECD/G20 BEPS project was created in the years following the 2008 financial crisis. In that period of global recession and declining tax revenues, revelations regarding cross-border tax avoidance by multinationals came to light. Powerful rich countries with robust welfare states dependent on tax revenues—including the U.S. and European countries—saw a need to combat MNE tax avoidance though increased coordination among themselves. The result was the BEPS reforms.

1. The BEPS Project's Initial Phase

In 2012, G20 leaders charged the OECD with advancing a solution to ensure that multinationals pay their fair share of taxes.¹⁶ In response, the OECD created a proposed BEPS Action Plan in 2013 and delivered final recommendations in 2015.¹⁷ The OECD set forth fifteen measures (“Action Items”) to combat MNE tax avoidance,¹⁸ some of which addressed substantive reforms¹⁹ while others focused on information transparency²⁰ or

¹⁵ See, e.g., Reuven Avi-Yonah, “International Taxation, Globalization, and the Economic Digital Divide,” *Journal of International Economic Law* 26, no. 1 (March 1, 2023): 101–9, <https://doi.org/10.1093/jiel/jgac068> (“developing countries would in general prefer to refrain from granting tax incentives, if only they could be assured that no other developing country would be able to grant such incentives”).

¹⁶ G20, *G20 Leaders' Declaration*, ¶ 48 (June 19, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/19/g20-leaders-declaration>; G20, *Final Communiqué, Meeting of Finance Ministers and Central Bank Governors*, ¶ 21 (Nov. 5, 2012), <http://www.g20.utoronto.ca/2012/2012-121105-finance-en.html>.

¹⁷ OECD, *Action Plan on Base Erosion and Profit Shifting* (July 19, 2013) at 11, <https://www.oecd.org/ctp/BEPSActionPlan.pdf>; OECD, *BEPS Final Reports: Explanatory Statement 2015* ¶ 1-4 (2015), <https://www.oecd.org/ctp/beps-explanatory-statement-2015.pdf>.

¹⁸ See OECD, *BEPS Actions*, <https://www.oecd.org/tax/beps/beps-actions/>, last accessed Feb. 10, 2024).

¹⁹ See *id.*

²⁰ See BEPS Actions, *supra* note 18.

procedures.²¹

Developing countries were not included in the formulation of these initial Action Items.²² However, the OECD and G20 came under increasing pressure to involve them. Accordingly, 2016 saw the establishment of the BEPS Inclusive Framework, allowing developing countries to participate on an “equal footing” in implementation of the recommended reforms.²³ As of May 2024, the Inclusive Framework had 147 members.²⁴

The first phase of the project mostly targeted tax base erosion while staying within the constraints of existing tax structures and paradigms (such as longstanding concepts of source and residence and existing treaty concepts such as permanent establishment). For example, although an important priority from the project’s inception had been the tax challenges posed by the digital economy, an early decision was made to not treat the digital economy separately from the “mainstream” economy in the project’s first phase.²⁵ This decision reverberated in subsequent OECD work: Growing frustration among countries regarding their inability to tax the digital economy under existing rules prompted the OECD in 2018 to start exploring an even more transformational “two-pillar solution” for modernizing global tax rules.²⁶ By 2019, the groundwork had been laid for what later became Pillars One and Two.²⁷

2. The Next Phase: The “Two-Pillar Solution”

²¹ For example, establishing mutual agreement procedures and a multilateral instrument for treaty modification (Actions 14 and 15). See BEPS Actions, *supra* note 18.

²² *OECD Secretary General Report to G20 Finance Ministers* (Feb. 2016) at 5, 8, <https://www.oecd.org/g20/summits/hangzhou/oecd-secretary-general-tax-report-g20-finance-ministers-february-2016.PDF> (discussing creation of IF to implement BEPS measures after they were already developed and endorsed by the G20 in November 2015); OECD, *Inclusive Framework on BEPS: Progress Report July 2016-June 2017* (June 2017) at 4, <https://www.oecd.org/tax/beps/inclusive-framework-on-BEPS-progress-report-july-2016-june-2017.pdf> (discussing IF’s creation).

²³ *Id.*

²⁴ *Members of the OECD/G20 Inclusive Framework on BEPS*, *supra* note 5.

²⁵ OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (Paris: Organisation for Economic Co-operation and Development, 2015), https://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en.

²⁶ See Stephanie Soong, “BEPS 5 Years Later: Action 1 and the Quest to Tax Digital Activity,” <https://www.taxnotes.com/featured-news/beps-5-years-later-action-1-and-quest-tax-digital-activity/2020/10/02/2d0lg> (Oct. 5, 2020) (summarizing path from BEPS phase one to two).

²⁷ See Stephanie Soong, “OECD Sets Course Toward Global Digital Tax Deal by 2020,” <https://www.taxnotes.com/beps-expert/digital-economy/oecd-sets-course-toward-global-digital-tax-deal-2020/2019/06/03/29kb1> (June 3, 2019).

In October 2021, the Inclusive Framework issued a “Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,” and 139 countries (representing most but not all Inclusive Framework countries) had joined the Statement as of June 2023.²⁸ This two-pillar solution is widely seen as a historic, landmark, international tax reform. Unlike the BEPS project’s earlier work, which left in place the core existing architecture of international taxation, the Two-Pillar solution envisions a more substantively dramatic reform of the international tax rules.

Pillar One reallocates a portion of the profits of covered multinationals to “market jurisdictions”—generally, countries where the consumers of the MNE’s products or services are located—allowing those countries to tax those profits.²⁹ Before Pillar One, jurisdictions with customers, but in which the MNE had no “physical presence,” lacked jurisdiction to tax those profits. Thus, Pillar One may significantly change where large MNEs pay tax.³⁰

Pillar Two establishes a 15% global minimum tax regime for large multinational groups with operations in multiple countries (those with €750 million or more of consolidated revenues).³¹ Model “GloBE” rules for implementing Pillar Two were released in December 2021.³² Pillar Two

²⁸ OECD, Two-Pillar Statement, *supra* note 6; OECD, *Members of the OECD/G20 Inclusive Framework on BEPS Joining the October 21, 2021 Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy as of 9 June 2023*, <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf>.

²⁹ OECD, *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy—Frequently Asked Questions*, (July 2022), <https://www.oecd.org/tax/beps/faqs-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2022.pdf>.

³⁰ *Id.* A 2023 OECD working paper describes Amount A as “a zero-sum redistribution of corporate tax base across jurisdictions [that] has positive global revenue effects because tax base is significantly redistributed from low-tax to high-tax jurisdictions.” Pierce O’Reilly et al., “Update to the Economic Impact Assessment of Pillar One: OECD/G20 Base Erosion and Profit Shifting Project” (Paris: OECD, October 11, 2023) at 13 ¶26, <https://doi.org/10.1787/7c35a55c-en>. The paper clarifies that “the primary goal of Amount A is not to generate addition tax revenues, but rather to adjust profit allocation and nexus rules in response to tax challenges arising from the digitalization and globalization of the economy.” *Id.* In contrast, Pillar 2 aims to significantly increase the tax paid globally by large MNEs.

³¹ See Pillar Two Model Rules, *supra* note 8.

³² See *id.* The GloBE rules are optional, but IF members must respect them if other member countries adopt them. See Pillar Two FAQs, *supra* note 9 (Question 3). An important question is what “critical mass” is needed for the regime to function as intended. See Michael P. Devereux, Johanna Paraknewitz, and Martin Simmler, “Empirical Evidence on the Global Minimum Tax: What Is a Critical Mass and How Large Is the Substance-Based Income Exclusion?,” *Fiscal Studies* 44, no. 1 (2023): 9–21, <https://doi.org/10.1111/1475-5890.12317>.

effectively allocates the MNE group's revenue across countries in which the group operates via three main rules that establish a priority of taxing rights:³³

First, if a country where an entity in the corporate group is located has an effective tax rate less than the 15% agreed-upon minimum, then an "Income Inclusion Rule" ("IIR") will apply, entitling the country of the MNE's ultimate parent entity (or country of an intermediary country parent entity if the ultimate parent country doesn't collect the tax) to collect an additional tax to "top up" the effective tax rate to 15%.³⁴ The IIR disincentivizes countries from having too low a tax rate.

Second, Pillar Two allows a country with a lower-tier entity in the MNE group to supplant the right of the country of the MNE parent to levy the top-up tax described above (as well as under the "Undertaxed Profits Rule" described below), even if that country's effective tax rate is below the 15% minimum. A country can do so by adopting a "qualified domestic minimum tax" ("QDMT"), which gives that jurisdiction the primary right to tax income sourced in that jurisdiction.³⁵

Third, if the countries in which the ultimate MNE parent *and* the low-tax MNE entity are located *both* choose not to levy a top-up tax through either the IIR or QDMT, the GloBE rules allow intermediate countries (countries with a middle-tier member of the MNE group) to collect the top-up tax instead through a "Undertaxed Profits Rule" or "UTPR." This is done by adjusting the income of the relevant entities in the multinational group to calculate an equivalent to the tax not collected by other eligible jurisdictions.

In addition to these three priority "GloBE" rules, two other features of Pillar Two affect countries' domestic tax regimes, including, critically, those of developing countries:

First, a "Substance-Based Income Exclusion" (or "SBIE") carveout provides that certain MNE income that is taxed in the source country at an effective tax rate of less than 15% is nonetheless excluded from the GloBE priority rules. Generally, substance-based income is income routinely earned from investment in substantive activities (e.g., payroll costs or asset expenses, where there are "real" assets or employees). As the OECD describes, the SBIE "allows a jurisdiction to continue to offer tax incentives that reduce taxes on routine returns from investment in substantive activities, without

³³ See Pillar Two Model Rules, *supra* note 8.

³⁴ The multinational group's effective tax rate in a country is the ratio of the group's covered taxes paid in the country on its GloBE income divided by the multinational's GloBE income of that country. Pillar Two Model Rules, *supra* note 8.

³⁵ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*, OECD/G20 Inclusive Framework on BEPS (Feb. 1, 2023) at ¶ 5.1.1., <https://www.oecd.org/tax/beps/agreed-administrative-guidance-for-the-pillar-two-globe-rules.pdf>.

triggering additional GloBE top-up tax.”³⁶ The SBIE carveout is important for developing countries, which tend to be more dependent on source-based taxing rights. However, as others have noted, and as we discuss further below, not all existing developing country tax incentives will fare equally favorably under the new rules.³⁷

Second, Pillar Two allows countries to consider adopting a “Subject-to-Tax Rule” (“or “STTR”), which modifies existing tax treaties that include withholding taxes below 9% on certain types of intra-group income.³⁸ The STTR, if adopted, overrides existing tax treaties through a “multilateral instrument,”³⁹ and enables source countries to impose additional tax on qualifying income (e.g., interest and royalties) that is taxed below 9% in the jurisdiction of the payment recipient.⁴⁰ In a July 2023 statement, the Inclusive Framework noted that the STTR was an “integral” part of the Pillar Two consensus for developing country members (which, as noted, tend to be source countries).⁴¹ The OECD has stated that the STTR “will allow countries to retain their taxing right, which they may have otherwise ceded under a tax treaty, on certain payments made to related parties abroad which often pose BEPS risks, such as interest and royalties,” enabling developing countries to “further protect their tax base.”⁴² Whether the STTR will play any significant role remains to be seen.

In summary, through the interlocking rules described above, Pillar Two establishes a mechanism by which covered income of large MNEs will be subject to minimum taxes worldwide. Ultimately, additional tax on the low-taxed income of a large multinational group will be collected by either the

³⁶ Pillar Two FAQs, *supra* note 9 (Question 7).

³⁷ See Christians, Allison, Thomas Lassourd, Kudzai Mataba, Eniye Ogbemor, Alexandra Readhead, Stephen Shay, and Zach Pouga Tinhaga. “A Guide for Developing Countries on How to Understand and Adapt to the Global Minimum Tax.” (2023), https://www.iisd.org/system/files/2023-06/guide-developing-countries-adapt-global-minimum-tax-final_0.pdf; see also *infra* Parts II.A.3, III.B.2.

³⁸ OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Subject to Tax Rule (Pillar Two): Inclusive Framework on BEPS* (Paris: Organisation for Economic Co-operation and Development, 2023), https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-the-digitalisation-of-the-economy-subject-to-tax-rule-pillar-two_9afd6856-en [hereinafter OECD, *STTR*]; OECD/G20 BEPS Project, *Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (11 July 2023), <https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf> [hereinafter *Outcome Statement*] (Part III).

³⁹ OECD, *Multilateral Convention to Facilitate the Implementation of the Two-Pillar Subject to Tax Rule* (Oct. 2023), <https://www.oecd.org/tax/beps/multilateral-convention-to-facilitate-the-implementation-of-the-pillar-two-subject-to-tax-rule.htm>.

⁴⁰ OECD, *STTR*, *supra* note 38, at 6 (¶1).

⁴¹ *Outcome Statement*, *supra* note 38 (¶14).

⁴² Pillar Two FAQs, *supra* note 9 (Question 2).

parent-entity jurisdiction, the low-taxed entity jurisdiction, or an intermediate jurisdiction. The rules are designed to ensure that the threat of having forgone taxes “picked up” by another jurisdiction (rather than benefiting the taxpayer) will prompt otherwise reluctant countries to collect higher taxes. These new rules therefore create strong incentives for countries to adopt or drop certain features and embrace higher tax rates. Additionally, Pillar Two will render ineffective some countries’ current domestic tax policies, regardless of whether those countries themselves adopt the GloBE rules. Affected policies include certain tax incentives that countries have used to attract foreign investment.⁴³ Thus, the new Pillar Two rules enable countries, through their internal tax decisions, to affect the tax systems and policies of nonparticipating countries in an arguably unprecedented way.⁴⁴

3. Comparing the Pillars

Examining the two Pillars side by side reveals three insights:

First, Pillar Two far outstrips Pillar One in terms of overall tax revenue impact. Pillar One’s Amount A is estimated to increase global tax revenue by an average of USD 9.8-22.6 billion annually for 2017-2021. As further elaborated in Part II.A.1, OECD revenue estimates show that the corporate tax revenue impact of Pillar Two is expected to be almost seven times that of Pillar One.⁴⁵

Second, although developing countries are expected to secure more of the increased corporate tax revenue under Pillar One,⁴⁶ developed countries are expected to secure more of the increased revenue under Pillar Two, which (as just noted) greatly outsizes Pillar One’s tax revenues. Thus, most of the tax

⁴³ While BEPS’s first phase targeted artificial MNE profit-shifting out of operating jurisdictions for tax purposes (a strategy often involving low-tax intermediary jurisdictions), Pillar Two has been viewed as more ambiguous in whether it prioritizes this same profit shifting problem or the related but distinct issue of tax competition among operating jurisdictions—or some mix of both. *See, e.g.,* Kysar, *supra* note 1 at 53-55; Michael Devereux & John Vella, *The Impact of the Global Minimum Tax on Tax Competition*, 15(3) *WORLD TAX J.* 323, 326-328 (2023).

⁴⁴ *See, e.g.,* Ruth Mason, “A Wrench in GLOBE’s Diabolical Machinery,” *Tax Notes International* 107:1391-95 (Sept. 19, 2022).

⁴⁵ *See also* O’Reilly, *supra* note 30.

⁴⁶ O’Reilly et al., *supra* note 30 at 34 ¶100 (“Amount A results in positive revenue impacts for low-, middle-, and high-income jurisdictions, with low-income jurisdictions gaining the most and high-income jurisdictions gaining the least, as a share of their current CIT revenues.”). Specifically, current OECD estimates report low-income IF members gaining 1.5-2.0% of corporate income tax on average of 2017-2021. *Id.* at 35 ¶101. For middle-income jurisdictions, the gain in corporate income tax would be 0.7-1.1%, and for high-income jurisdictions 0.5%-1.0% on average over the same period, with investment hubs losing corporate income tax. *Id.*

revenue benefit comes from Pillar Two, *and* most of that will go to developed countries.⁴⁷

Third, although the two pillars were introduced and preliminarily approved by the Inclusive Framework in October 2022 as a package, their implementation tracks have diverged. As of June 2024, the OECD has released a series of guidance documents on the application and implementation of Pillar Two and approximately 27 jurisdictions have final Pillar Two rules in force, ten have draft/proposed law published, and some others have undertaken public consultation.⁴⁸ In contrast, the Pillar One regime, which would be implemented through a multilateral convention, has not yet been approved, and the current target date of June 2024 for a signing ceremony remains uncertain.⁴⁹

The combination of greater revenue gains from Pillar Two, the fact that most Pillar Two benefits will go to developed countries, and the divergence in implementation progress has contributed to the emergence of significant criticisms of the BEPS project from developing country standpoints.

B. Developing Countries in the BEPS Project

Before proceeding further, it is important to define “developing countries.” There is no universally agreed-upon definition, and some even

⁴⁷ Importantly, jurisdictions categorized as “investment hubs” (tax havens or offshore financial centers) are projected to be “losers” under Pillar Two. Felix Hugger, Ana Cinta Gonzáles Cabral, Massimo Bucci, Maria Gesualdo & Pierce O’Reilly, “The Global Minimum Tax and the Taxation of MNE Profit,” OECD Taxation Working Papers No. 68, January 2024, ¶153, <https://doi.org/10.1787/9a815d6b-en>. Investment hubs may lose tax base if the minimum tax curtails their tax advantages, though whether they will lose tax revenue is less clear and will depend on factors such as QDMT adoption. *See, e.g.,* Zoe Andrews, “International tax reform – winner and losers,” *European Tax Blog*, Oct. 16, 2020, <https://www.europeantax.blog/post/102gib7/international-tax-reform-winners-and-losers>; Takayuki Nagato, “Pillar 2 as a De Facto New Revenue Allocation Mechanism,” *Tax Notes International* 112:23-37 (Sept. 29, 2023).

⁴⁸ “PWC’s Pillar Two Country Tracker”, PWC, updated June 3, 2024, <https://www.pwc.com/gx/en/tax/international-tax-planning/pillar-two/pwc-pillar-two-country-tracker-summary-v2.pdf>.

⁴⁹ *See, e.g.,* “Statement by the OECD Secretary-General on the 16th Meeting of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS),” OECD, May 5, 2024, <https://www.oecd.org/tax/statement-by-the-oecd-secretary-general-on-the-16th-meeting-of-the-inclusive-framework-on-base-erosion-and-profit-shifting-beps.htm>; David Lauder, “Yellen Says India and China Hindering ‘Pillar 1’ Tax Deal | Reuters,” accessed June 20, 2024, <https://www.reuters.com/business/finance/yellen-says-india-china-hindering-pillar-1-tax-deal-2024-05-24/>; Giuseppe Fonte, “Global Minimum Tax Deal on Multinationals Set to Fail, G7 Chair Says,” *Reuters*, May 24, 2024, sec. Business, <https://www.reuters.com/business/global-minimum-tax-deal-multinationals-set-fail-g7-chair-says-2024-05-24/>.

argue that the term is outdated.⁵⁰ Our modest goal is to set forth a working understanding that clarifies the issues at stake, upon which further analysis can be built.

Different international organizations classify countries differently, and some designations have shifted over time. The IMF in its World Economic Outlook divides countries into “advanced economies” and “emerging and developing economies,” noting that “[t]his classification is not based on strict criteria, economic or otherwise, but instead has evolved over time with the objective of facilitating analysis by providing a reasonably meaningful organization of the data.”⁵¹ The UN had in 1996 introduced a distinction between developed and developing regions in its “Standard Country or Area Codes for Statistical Use” publication for “statistical convenience,” but it removed this designation as of December 2021, noting that “[o]ver time the use of the distinction...has diminished.”⁵² The UN now states that it does not have a formal definition of developing as opposed to developed countries.⁵³ However, it concedes the continued importance of the distinction to some users, and maintains a user-accessible file containing historical and updated country groupings.⁵⁴

The World Bank classifies countries into four groups based on per capita gross national income (“GNI”), sorting them into low-, lower-middle-, upper-middle-, and high-income countries.⁵⁵ Countries’ classifications are updated

⁵⁰ Tariq Khokhar and Umar Serajudding, “Should We Continue to Use the Term ‘Developing World’?,” accessed June 20, 2024, <https://blogs.worldbank.org/en/opendata/should-we-continue-use-term-developing-world>.

⁵¹ IMF, “World Economic Outlook Database October 2015 -- WEO Groups and Aggregates Information,” accessed June 20, 2024, <https://www.imf.org/external/pubs/ft/weo/2015/02/weodata/groups.htm#cc>.

⁵² UN, “Methodology, Standard Country or Area Codes for Statistical Use (M49),” accessed June 20, 2024, <https://unstats.un.org/unsd/methodology/m49/> (Questions & Answers).

⁵³ *Id.* (“There is no definition of developing and developed countries (or areas) within the UN system.”).

⁵⁴ *Id.*; see also UN, “Classification of Developed and Developing Regions — Historical and Updated,” accessed June 20, 2024, <https://unstats.un.org/unsd/methodology/m49/historical-classification-of-developed-and-developing-regions.xlsx>.

⁵⁵ World Bank, “The World by Income and Region,” accessed June 20, 2024, <https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html#:~:text=The%20World%20Bank%20classifies%20economies,-middle%2C%20and%20high%20income>; World Bank, “How Does the World Bank Classify Countries?,” accessed June 20, 2024, <https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries>. GNI per capita is in USD, converted using the “World Bank Atlas method.” *Id.*; see also “The World Bank Atlas Method - Detailed Methodology”, accessed June 20, 2024, <https://datahelpdesk.worldbank.org/knowledgebase/articles/378832-what-is->

yearly based on the previous year's GNI per capita data, and classification thresholds are adjusted yearly for inflation.⁵⁶

We apply the World Bank's classification system to examine countries in BEPS project:⁵⁷

Table 1 shows Inclusive Framework countries that are low-income economies ("LICs") and lower-middle-income economies ("LMICs").⁵⁸ These would be considered developing countries.

Table 1. BEPS Inclusive Framework members that are Low-Income (5) and Lower-Middle Income (29) Economies (World Bank classification)		
Low-Income Economies (US\$1,135 or less)	Lower-Middle Income Economies (US\$1,136 to US\$4,465)	
Burkina Faso	Angola	Mauritania
Democratic Republic of the Congo	Benin	Mongolia
Liberia	Cabo Verde	Morocco
Sierra Leone	Cameroon	Nigeria
Togo	Congo, Rep.	Pakistan
	Cote d'Ivoire	Papua New Guinea
	Djibouti	Philippines
	Egypt	Samoa
	Eswatini	Senegal
	Haiti	Sri Lanka
	Honduras	Tunisia
	India (G20 member)	Ukraine
	Jordan	Uzbekistan
	Kenya	Vietnam
		Zambia

Table 2 shows Inclusive Framework countries that are upper-middle-income economies ("UMICs"). Many would also consider these countries developing countries.

[the-world-bank-atlas-method.](#)

⁵⁶ Nada Hamadeh, Catherine Van Rompaey & Eric Metreau, "World Bank Group Country Classifications by Income Level for FY 24," *World Bank Blogs*, June 30, 2023, <https://blogs.worldbank.org/opendata/new-world-bank-group-country-classifications-income-level-fy24>.

⁵⁷ Countries shown are IF members as of May 2024.

⁵⁸ IF members NOT classified by the World Bank are: Anguilla, Cook Islands, and Montserrat.

Table 2. BEPS Inclusive Framework members that are Upper-Middle-Income Economies (US\$4,455 to US\$13,845) (World Bank classification) (37 total)	
Albania	Jamaica
Argentina (G20)	Kazakhstan
Armenia	Malaysia
Azerbaijan	Maldives
Belarus	Mauritius
Belize	Mexico (OECD, G20)
Bosnia and Herzegovina	Moldova
Botswana	Montenegro
Brazil (G20)	Namibia
Bulgaria	North Macedonia
China (G20)	Paraguay
Colombia (OECD)	Peru
Costa Rica (OECD)	Russian Federation (G20)
Dominica	Saint Lucia
Dominican Republic	Saint Vincent and the Grenadines
Gabon	Serbia
Georgia	South Africa (G20)
Grenada	Thailand
Indonesia (G20)	Turkey (OECD, G20)

Table 3 shows Inclusive Framework members that are high-income (i.e., developed) countries.

Table 3. BEPS Inclusive Framework members that are High-Income Economies (US\$13,846 or more) (World Bank classification) (69 total)	
Andorra	Japan (OECD, G20)
Antigua and Barbuda	Jersey
Aruba	Korea, Rep. (OECD, G20)
Australia (OECD, G20)	Kuwait
Austria (OECD)	Latvia (OECD)
Bahamas, The	Liechtenstein
Bahrain	Lithuania (OECD)
Barbados	Luxembourg (OECD)
Belgium (OECD)	Macau SAR, China
Bermuda	Malta
British Virgin Islands	Monaco
Brunei Darussalam	Netherlands (OECD)
Canada (OECD, G20)	New Zealand (OECD)
Cayman Islands	Norway (OECD)
Chile (OECD)	Oman
Croatia	Panama
Curaçao	Poland (OECD)
Czech Republic (OECD)	Portugal (OECD)
Denmark (OECD)	Qatar
Estonia (OECD)	Romania
Faroe Islands	Saint Kitts and Nevis
Finland (OECD)	San Marino
France (OECD, G20)	Saudi Arabia (G20)
Germany (OECD, G20)	Seychelles
Gibraltar	Singapore
Greece (OECD)	Slovak Republic (OECD)
Greenland	Slovenia (OECD)
Guernsey	Spain (OECD)
Hong Kong SAR, China	Sweden (OECD)
Hungary (OECD)	Switzerland (OECD)
Iceland (OECD)	Trinidad and Tobago
Ireland (OECD)	Turks & Caicos
Isle of Man	United Arab Emirates
Israel (OECD)	United Kingdom (OECD, G20)
Italy (OECD, G20)	United States (OECD, G20)
	Uruguay

Tables 1, 2 and 3 yield important insights about developing countries' involvement in the BEPS project: First, there is considerable GNI per capita variation among Inclusive Framework countries.⁵⁹ At the risk of stating the obvious, the GNI per capita of the lowest-income members is very low (US\$1,135 or less), much lower than for UMIC- (US\$4,455 to US\$13,845) and developed country members (US\$13,846 or more). This provides an initial sense of the gulf between countries. Second, there are more UMICs

⁵⁹ Khokhar and Serajuddin, *supra* note 50 (noting an almost 40x difference between GNI per capita of Malawi versus Mexico).

(37) than LMICs (29) or LICs (5) in the Inclusive Framework and even more high-income countries (69). Thus, BEPS membership is skewed towards developed economies, with few LICs involved.

Third, the *proportion* of countries in each GNI per capita category also falls as we go down income categories. Table 4 below shows the percentage of countries in each income category that are Inclusive Framework members. This percentage falls as we go down the income category, and the percentage of LICs participating is particularly low (less than 20%). This suggests that when we hear discussion of “developing countries” in the BEPS project, it is mostly though not exclusively LMICs and UMICs we are talking about, not the very poorest countries (LICs).

Table 4. Percentage of Each World Bank Income Group that are Inclusive Framework (IF) Members.			
World Bank Income Group	IF Members	Non-Members	% Members
Low-Income	5	21	19.2%
Lower-Middle Income	29	25	53.7%
Upper-Middle Income	37	16	69.8%
High-Income	69	9	88.5%

Fourth, the distribution of G20 members across the income groups is also instructive. Tables 1, 2, and 3 indicate a country’s membership in the OECD and/or G20. As Table 1 shows, no LICs are G20 members, and only one LMIC is a G20 member (India). As Table 2 shows, there are 8 G20 countries in the UMIC category; and as Table 3 shows, the remaining 10 G20 countries are high-income developed countries. Moreover, the European Union (“EU”) has been a G20 member throughout the BEPS project (with the African Union only becoming a member in 2023).

These observations suggest an important caveat to a conventional narrative, which states that the G20’s involvement gave significant voice to and representation of developing country perspectives in the BEPS project, a sea change compared to previous OECD-led tax initiatives.⁶⁰ In reality, developing country G20 members are overwhelmingly in the UMIC category, and half the G20 are developed countries.⁶¹ This calls into question

⁶⁰ The Inclusive Framework was established in 2016 “at the request of the G20.” OECD, “Developing Countries and the OECD/G20 Inclusive Framework on BEPS: OECD Report for the G20 Finance Ministers and Central Bank Governors,” (hereinafter “Report to the G20”) Oct. 2021, at 4, <https://www.oecd.org/tax/beps/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps.pdf>. The OECD characterized its creation as “a key component of the architecture for international tax and development” and that “developing country members of the Inclusive Framework have played a vital role in shaping the agreement.” *Id.* at 12-13.

⁶¹ OECD membership is heavily skewed towards HICs. Only 4 UMICs are in the OECD;

the extent to which the G20 is actually representative of developing countries, particularly LICs and LMICs. G20 representation may have been an “upgrade” in developing-country influence in global tax reform, but the extent of that upgrade should not be overstated.

Finally, we cannot neglect non-joiners. As [Table 4](#) shows, a significant number of LICs, LMICs, and UMICs are not Inclusive Framework members, in contrast to only 10 high-income non-members (many of which are small island economies). Thus, a considerable number of developing countries are effectively bystanders to the BEPS reforms. These countries undoubtedly make their own tax policy decisions in light of the developments, but they are not involved in setting the terms. [Tables A.5](#) and [A.6](#) in the Appendix contain a full list of non-joining countries.

II. DEVELOPING COUNTRY CRITICISMS AND DEFENDERS’ RESPONSES

Commentators writing from developing country standpoints have been critical of both phases of the BEPS reforms. As Part III argues, however, these criticisms have often been downplayed as inconsistent and overstated, which has led to an underappreciation of their unifying themes.

To set up our argument, we first summarize key developing country-based criticisms, with a focus on Pillar Two. Our summary draws on statements and commentaries from country representatives as well as from regional country groupings and organizations, NGOs, and academics writing from developing country perspectives (including working papers, reports, blog posts, interviews, and statements made while speaking in official capacities). Whether a statement or commentary is from a developing country standpoint is not always indisputable, and we try to provide clarifying information in close cases.

A. Key Developing Country Criticisms

1. Tax Revenue Effects

One set of concerns focuses on revenue effects, with two interlocking dimensions: first, that developing countries will not get much additional tax revenue from the BEPS reforms; and second, that developing countries will get an unfair share of revenues in comparison to developed countries.⁶²

the remaining members (34) are HICs.

⁶² Some contend that developing countries may even get less revenue than before, particularly where Pillar One requires that countries abandon digital services taxes. *See, e.g.*, South Centre, “Statement by the South Centre on the Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy,” July 28, 2023,

Regarding the limited revenue gains from Pillar Two to developing countries, organizations such as the South Centre (which does research and policy analysis on issues concerning development and developing countries), along with individual commentators,⁶³ have identified various reasons for limited revenue gains. These include limitations on the effectiveness of QDMTs due to surviving base erosion techniques,⁶⁴ STTR design features that limit its benefits for developing countries,⁶⁵ and the constraining effects of bilateral investment treaties (“BITS”) previously entered into by some developing countries (which may have promised tax incentives for foreign investment that may not be easily removed and that may therefore constrain developing countries’ ability to adopt a 15% minimum tax).⁶⁶

The precise revenue effects for particular countries remain unknown, but the OECD’s own estimates tend to support these concerns: The OECD’s 2020 estimates—based on Pillars One and Two as originally drafted—suggested that revenue gains from Pillar Two would be larger in high-income countries (because MNE parent entities are largely headquartered there), though lower-

<https://www.southcentre.int/wp-content/uploads/2023/07/SC-Statement-on-IF-Two-Pillar-Solution-July-2023.pdf>, (Pillar One could “mean an erosion, rather than an increase, of taxing rights of developing countries”); Julie M. McCarthy, “The New Global Tax Deal is Bad for Development,” *Brookings*, May 16, 2022, <https://www.brookings.edu/articles/the-new-global-tax-deal-is-bad-for-development/>.

⁶³ See, e.g., Suranjali Tandon, “Policy Note: Assessing the Impact of Pillar Two on Developing Countries,” *Intertax* 50, no. Issue 12 (October 1, 2022): 923–35, <https://doi.org/10.54648/TAXI2022094>, (arguing Pillar Two will generate limited revenue gains for developing countries, while restricting their ability to offer tax incentives); Oluwakemi Gbadebo & Omojo Adefila, “The Global Two-Pillar Solution: Why Nigeria Said No,” 109 *Tax Notes International* 109:1825-27 (March 2023) (noting “potential negative effects on revenue generation”); Seydou Coulibaly, “Revenue Effects of the Global Minimum Corporate Tax Rate for African Economies,” South Centre Tax Cooperation Policy Brief (2022), https://www.southcentre.int/wp-content/uploads/2022/11/TCPB26_Revenue-Effects-of-the-Global-Minimum-Corporate-Tax-Rate-for-African-Economies_EN.pdf, (“the global minimum tax deal is unlikely to increase tax revenue for African economies”).

⁶⁴ South Centre, *supra* note 62, at 4.

⁶⁵ *Id.* at 3.

⁶⁶ Catherine Brown, “A Global Minimum Tax: Is Pillar Two Fair for Developing Countries?,” (blog) *International Centre for Tax & Development*, July 19 2023, <https://www.ictd.ac/blog/global-minimum-tax-pillar-two-fair-developing-countries/>; Catherine Brown & Elizabeth Whitsitt, “Implementing Pillar Two: Potential Conflicts with Investment Treaties,” *Canadian Tax Journal* 71:189-207 (2023); *but see* Reuven Avi-Yonah, “Pillar 2 and the BITS,” (June 9, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461285 (arguing that in “three-country situations” MNEs are unlikely to bring arbitration claims); Javier Rubinstein, Lauren Friedman, and Tamsin Parzen, “Using Investment Treaties to Prevent Pillar 2’s Revocation of Promised Tax Incentives,” *Tax Notes International* 113:959-69 (Feb. 19, 2024) (detailing how MNEs may use investment treaties to avoid taxation under a country’s QDMT).

income countries would still enjoy some gains.⁶⁷

The OECD updated its estimates in 2023 and 2024.⁶⁸ These updates, which reflect rule modifications and different modeling assumptions,⁶⁹ continue to show larger revenue gains from Pillar Two for higher-income countries than for upper- and lower-middle-income countries.⁷⁰ The OECD notes several factors could affect actual outcomes, including countries' implementation decisions, the design of current and future tax incentives, how MNEs strategize around the new rules, elasticity of profit shifting, responses of non-member countries, and implementation timetables.⁷¹

Concededly, low-income countries will see the largest revenue gains from

⁶⁷ Pillar Two Model Rules, *supra* note 8 at 18 (¶24 and Fig. 1.1).. The OECD estimated that overall revenue gains under Pillar Two would be greater than for Pillar One (US\$42-70 billion per year, as opposed to US\$5-12 billion per year under Pillar One "Amount A").

⁶⁸ O'Reilly *et al.*, *supra* note 30; Hugger *et al.*, *supra* note 47; *see also* OECD Webinar: "Economic impact of the Two-Pillar Solution," *OECD Webinar* (hereinafter "OECD 2024 Webinar") (Jan. 9, 2024), slide 8, <https://www.oecd.org/tax/beps/webinar-economic-impact-assessment-two-pillar-solution.htm>. The 2020 estimates include revenue gains for non-IF members while the 2024 Pillar Two estimates include member countries only. Hugger *et al.* at 49.

⁶⁹ The revised revenue estimates reflect better data, improved methodologies, and ongoing adjustments to the Pillars One and Two rules. For example, the December 2021 introduction of QDMT rule allowing source countries to collect the tax that would otherwise have been collected through the IIR arguably rendered the distributional consequences more favorable for developing countries. *See, e.g.*, Michael Devereux, John Vella, and Heydon Wardell-Burrows, "Pillar Two: Rule Order, Incentives, and Tax Competition," *Policy Brief, Oxford University Center for Business Taxation* (Jan. 14, 2022), <https://dx.doi.org/10.2139/ssrn.4009002>; Sarah Paez, "Developing Countries Should Focus on Top-Up Tax, OECD Rep Says," *Tax Notes International* 110:263-64 (April 10, 2023); *see also* Pillar Two Model Rules, *supra* note 8 at 29 (¶5.2.3). As noted, however, commentators worry that developing countries' ability to use and benefit from QDMTs may be limited. *See* Brown, *supra* note 66; Brown & Whitsitt, *supra* note 66; *see also* Alexandra Readhead, Thomas Lassourd and Howard Mann, "The End of Tax Incentives: How Will a Global Minimum Tax Affect Tax Incentives Regimes in Developing Countries?," *Investment Treaty News*, Int'l Institute for Sustainable Development (Oct. 7, 2021), <https://www.iisd.org/itn/en/2021/10/07/the-end-of-tax-incentives-how-will-a-global-minimum-tax-affect-tax-incentives-regimes-in-developing-countries-alexandra-readhead-thomas-lassourd-howard-mann/>.

⁷⁰ Hugger *et al.*, *supra* note 47, at 49, ¶105 and Fig. 15 ("Results show broad gains across all jurisdictional groups, with higher gains for high income jurisdictions relative to lower and upper middle income.... Low income jurisdictions also gain from the GMT but given that they account for small share of global GDP and have a relatively small tax base, revenue gains are more volatile and more strongly affected by profit shifting assumptions compared to other jurisdictional groups.").

⁷¹ *Id.* at 9, 12, 46-48; OECD Webinar 2024, *supra* note 68, slides 24-26; *see also* Martin Sullivan, "Disentangling the OECD's New Estimates of Pillar Two Effects," *Tax Notes International* 113:303-05 (Jan. 15, 2024).

Pillar One Amount A.⁷² But, as discussed in Part I.A.3, overall revenue gains from Pillar Two will be much greater than those from Pillar One, and the Pillar Two work is much further along.⁷³

2. Foreign Investment Effects

Developing countries also worry that Pillar Two will reduce their ability to draw foreign direct investment (“FDI”). This FDI concern is connected to the criticism regarding limited tax revenue gains but is also somewhat in tension with it. For example, a South Centre policy brief notes that with the introduction of a global minimum tax and its impacts on tax incentives, “African countries that were attractive because of their generous tax provisions may experience a decline in foreign direct investment inflows, thereby leading to a potential reduction of their corporate tax bases.”⁷⁴ However, the policy brief recognizes that “some countries may fully comply with the global minimum tax rate, but they can still offer tax credits to multinational enterprises to attract investments, which may undermine the revenue gain from implementing the global minimum tax rate” and concludes that “the theoretical impact of the minimum effective corporate tax rate on tax revenue for African economies is controversial.”⁷⁵

Such commentaries speak to the complicated and sometimes inconsistent interplay of revenue and FDI effects for developing countries: Developing countries worry that they will not get enough tax revenue from Pillar Two. But they also worry that—either by taxing too heavily or by forcing changes in tax incentives and other provisions—Pillar Two will make them less attractive to FDI.⁷⁶

Two points bear emphasizing:

First, like criticisms regarding tax revenue effects, FDI criticisms have a

⁷² O’Reilly *et al.*, *supra* note 30, at 34 (¶53) (“Amount A results in positive revenue impacts for low-, middle-, and high-income jurisdictions, with low-income jurisdictions gaining the most and high-income jurisdictions gaining the least, as a share of current CIT revenues.”). Specifically, low-income IF members “would gain 2.5%-3.0% of CIT in 2021,” middle-income would gain 1.2%-1.6% of CIT in 2021,” and “[h]igh-income jurisdictions would gain 0.9%-1.4% of CIT in 2021.” *Id.* at 35 (¶101), 37 (Fig. 5.3). *See also* OECD (2020), *supra* note 67, at 18 (¶23).

⁷³ The January 2024 Pillar Two estimate stands at US\$155-192 billion per year, as opposed to US\$9.8-22.6 billion per year (2017-21) or US\$17.4-31.7 billion (2021) under Pillar One Amount A (October 2023 estimate). Hugger *et al.*, *supra* note 47, at 12, 52; O’Reilly *et al.*, *supra* note 30, at 8 (¶6).

⁷⁴ Coulibaly, *supra* note 63, at 2.

⁷⁵ *Id.*

⁷⁶ Another possibility is that developing countries may comply with Pillar Two but continue to try and attract FDI through types of tax incentives not implicated by Pillar Two, thereby undercutting the revenue gains from Pillar Two.

comparative dimension: In its 2022 World Investment Report, UNCTAD projected that Pillar Two would cause the overall volume of FDI to decline and that “[l]ess scope for tax competition could intensify competition for investment based on non-tax factors, such as an improved business climate.”⁷⁷ UNCTAD noted that developing countries that are not low-tax offshore financial centers (“OFCs”) might gain FDI from OFCs as tax rate differences shrink and that this “diversion effect” could “counterbalance investment losses caused by the volume effect,” but stated that for this to happen, developing countries would have to “push on other more critical investment determinants such as those associated with economic or institutional fundamentals.”⁷⁸ UNCTAD also observed that after Pillar Two, developing economies would experience growth in tax revenues from FDI income of 15% while developed economies would see 31%.⁷⁹ Developing economies would see their share of world tax revenue from FDI income drop from 45.1% pre-Pillar Two, to 43.2% after Pillar Two, while developed economies would experience a jump from 52.1% to 56.8%.⁸⁰ Thus, while many unknowns remain, the report suggests that developing countries may have to make significant non-tax institutional changes to draw FDI and may see less growth in and a smaller share of tax revenues from FDI income than developed countries.

Second, an implicit point underlying the FDI critique is that investment patterns are not static.⁸¹ As tax rate differentials between developing and developed countries close, MNEs may opt for less total investment, or for investment in developed economies. The latter may occur, for example, if developing countries cannot make the types of non-tax reforms necessary to stay competitive or are forced to abandon tax incentives proscribed by Pillar Two and cannot offer alternatives. Shifting investment patterns could leave developing countries with less revenue *and* less FDI.

3. Effects on Existing Tax Incentives

It has become widely recognized that countries will have to review their

⁷⁷ UNCTAD, “The Impact of a Global Minimum Tax on FDI,” *World Investment Report* (2022), at 126, https://unctad.org/system/files/official-document/wir2022_ch03_en.pdf.

⁷⁸ *Id.* at 130.

⁷⁹ *Id.* at 125 fig. III.10.

⁸⁰ *Id.*

⁸¹ See, e.g., Cihat Öner, “An Analysis of Controlled Foreign Company Rules, the OECD’s Pillar Two and Developing Countries,” 78(1) *Bulletin for International Taxation* 78:11-29 (2024) (noting that “[i]n response to the effect of increased investment costs [under Pillar Two taxation], MNEs will probably reconsider the location of their investments. . . . [t]his would definitely affect the attractiveness of the developing countries that especially trust tax incentives to attract and support investment.”).

tax incentives in light of Pillar Two and that developing countries may be especially affected.⁸² A policy guide released by the International Institute for Sustainable development (“IISD”), a Canadian think tank, sorts tax incentives based on whether the global minimum tax will have a high, medium, or low impact on it⁸³ and finds that Pillar Two will have the highest impact on income tax holidays and export processing zones, which are most commonly used by developing countries.⁸⁴ If tax incentives reduce a multinational’s effective tax rate below 15%, a top-up tax will be due under the IIR. Thus, commentators have advised developing countries to reevaluate their tax incentives and/or consider enacting a QDMT to avoid losing tax revenues to other countries.⁸⁵

Accordingly, various observers have expressed worries about Pillar Two’s effects on developing country tax incentives (and hence on their ability

⁸² See, e.g., Coulibaly, *supra* note 63 at 2, 6 (highlighting potential FDI decline for “[African] countries that were attractive because of their generous tax provisions”; contending that “African countries with poor infrastructure and business climate may experience a portion of FDI outflows due to the erosion of their tax attractiveness”); Nana Ama Sarfo, “Is Pillar 2 Right for Caribbean Nations? Depends Who you Ask,” *Tax Notes International* 111:124-27 at 126 (July 10, 2023) (quoting Bermudian Minister of Finance saying that “[t]he global minimum tax will represent a fundamental change in the way that Bermuda does business and . . . raises revenue” and that one big risk is whether companies will leave once Pillar Two is in place and they lose the benefit of a zero rate tax system).

⁸³ Christians, *supra* note 37 (Appendix A); see also Belisa Feerreira Liotti et al., “The Treatment of Tax Incentives Under Pillar Two,” *UNCTAD Transnational Corporations Journal* 29:26-46 (July 2022) (assessing impact of Pillar Two on tax incentives).

⁸⁴ “Options for Low Income Countries’ Effective and Efficient Use of Tax Incentives for Investment,” IMF (Oct. 2015) at 9, <https://www.imf.org/external/np/g20/pdf/101515.pdf> (chart showing use of income tax incentives by country income-groups); Maria Andersen, Benjamin Kett and Erik von Uexkull, “Corporate Tax Incentives and FDI in Developing Countries,” *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications* 73-99 (World Bank 2017), <https://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-1175-3?chapterTab=true>.

⁸⁵ See, e.g., David Bradbury, “Domestic Corporate Tax Reform Under Pillar Two,” OECD (presented at “The Twelfth IMF-Japan High-Level Tax Conference for Asian Countries,” Oct. 25, 2022); Paez, *supra* note 69; Christians et al., *supra* note 37; ATAF, “Suggested Approaches to Drafting Domestic Minimum Top-Up Tax Legislation” (Sept. 30, 2023) [hereinafter ATAF, *Suggested Approaches*], at 2, https://events.ataftax.org/includes/preview.php?file_id=209&language=en_US; ATAF, “Responding to the Implementation of the Global Minimum Tax: Policy Considerations,” Policy Brief (Aug. 2023), https://events.ataftax.org/index.php?page=documents&func=view&document_id=203; Christians, *supra* note 37 (recommending governments revisit their tax incentive regimes, and remove, renegotiate, or replace incentives impacted by Pillar Two); Gitarani Prastuti, “An Indonesian Perspective on Global Tax Reform and Pillar Two,” *Tax Notes International* 109:587-93 (Jan. 30, 2023) (recommending modification of tax incentives and use of nonfiscal investment policy).

to draw FDI).⁸⁶ Concededly, though, not all commentary is negative. Some have noted that Pillar Two may be an opportunity for developing countries to purge their systems of inefficient or harmful tax incentives.⁸⁷

4. Complaints that Global Minimum Tax Rate is Too Low

Some developing country voices have also complained that the 15% global minimum tax rate is too low.⁸⁸ For example, representatives from both Argentina and Nigeria have noted that 15% is too low to stop base erosion in countries with higher headline corporate tax rates.⁸⁹ A number of international groups have also articulated this point, including Oxfam,

⁸⁶ See, e.g., Coulibaly, *supra* note 82; Dagan, *supra* note 2, at 644 (discussing developing country complaints about Pillar Two's effects on tax incentives).

⁸⁷ See, e.g., ATAF Policy Brief, *supra* note 85, at 1 ("ATAF has long advocated for the need for policy changes ...to put an end to the granting of often ineffective and wasteful tax incentives, while providing certainty that fosters economic growth of countries, and encourages investment opportunities"); ATAF, "Suggested Approaches," *supra* note 85, at 2 ("The GloBE rules may also relieve some of the pressure African countries face to grant tax incentives which, in many cases, are inefficient and often wasteful.")

⁸⁸ Jose Antonio Ocampo and Tommaso Faccio, "A Global Tax Deal for the Rich, Not the Poor," *Project Syndicate* (June 11, 2021), <https://www.project-syndicate.org/commentary/g7-corporate-tax-agreement-unfair-to-developing-countries-by-jose-antonio-ocampo-and-tommaso-faccio-2021-06> ("The first concern...is that the proposed minimum tax rate of 15% is low, close to the rates in tax havens like Switzerland and Ireland. This reflects a preference by several G7 countries to protect their own multinationals..."). Oxfam International, "G7 Global Corporate Tax Deal is Far from Fair", news release, June 5, 2021, <https://www.oxfam.org/en/press-releases/g7-global-corporate-tax-deal-far-fair-oxfam> ("fixing a global minimum corporate tax rate of just 15 percent is far too low"); African Tax Administration Forum, "A New Era of International Tax Rules — What Does this Mean for Africa?," (Oct 2021), <https://www.ataftax.org/a-new-era-of-international-taxation-rules-what-does-this-mean-for-africa> ("[I]n ATAF's view, for [a global minimum tax] to be effective, the minimum effective rate needed to be at least 20% rather than 15% if it is to stem artificial profit shifting out of Africa as most African countries have a statutory corporate income tax rate of between 25% and 35%. Multinationals will only be disincentivized from such profit shifting in Africa if all its profits are taxed at least at 20% no matter in which jurisdiction the profits are reported."). Global Alliance for Tax Justice, "Why the United Nations is the Only Place Where a Just Global Tax Reform Can Be Done," (July 24, 2023), <https://globaltaxjustice.org/news/why-the-united-nations-is-the-only-place-where-a-just-global-tax-reform-can-be-done/> (noting 15% minimum tax "would, at best, give a 2% revenue raise to the developing countries, but 16% to rich countries. In addition, it will induce a 'race to the minimum' by forcing countries to reduce their corporate income tax rates. So the reform the OECD is pushing is not only biased against developing countries, it clearly favours rich countries."); Stephanie Soong, "Argentina Will Endorse Global Minimum Tax Rate Above 15 Percent," *Tax Notes Today International* 124-1 (June 29, 2021).

⁸⁹ See Soong, *supra* note 88.

African Tax Administration Forum, and the South Centre.⁹⁰

The too-low minimum tax rate has led some to warn developing countries against adopting a QDMT. For example, the BEPS Monitoring Group and South Centre have argued that developing countries with corporate tax rates higher than 15% will not benefit from a QDMT, which largely benefits low-tax jurisdictions offering tax incentives.⁹¹ Both have noted the risk that, because the QDMT does not prevent profit shifting using existing transfer pricing rules, it in effect operates as a ceiling on corporate tax rates, encouraging developing countries with rates higher than 15% to race to the 15% bottom.⁹²

5. Complexity, Administrability, and Regime Design

Another complaint is that the Pillar Two rules are complex and costly to implement and administer.⁹³ In recommending that developing countries should not participate in the GloBE regime, the BEPS Monitoring Group and South Center point to rule complexity and developing countries' capacity constraints, ultimately concluding that participation would be neither beneficial nor cost effective for many countries.⁹⁴ Nigeria, which had held

⁹⁰ See sources cited *supra* note 88. A related complaint is that the STTR rate of 9% is also too low. See, e.g., Nana Ama Sarfo, "Pillars 1 and 2: Who Got What They Wanted?," *Tax Notes International* 104: 382-85 (Oct. 25, 2021) ("Developing countries were hoping for a higher [STTR] rate but didn't get it. Most developing countries are using 10 to 15 percent withholding rates in their treaties on interest and royalties, so the STTR rate at 9 percent may not be particularly effective in combating BEPS.").

⁹¹ BEPS Monitoring Group, "Taxing Multinationals: The BEPS Proposals and Alternatives," (July 6, 2023), at 6, <https://static1.squarespace.com/static/5a64c4f39f8dceb7a9159745/t/64a59dac21100f1f90f38c41/1688575404801/The+BEPS+Proposals+and+Alternatives.pdf>; Emmanuel Eze et al, "The GloBE Rules: Challenges for Developing Countries and Smart Policy Options to Protect Their Tax Base," *The South Centre Tax Cooperation Policy Brief* (Aug. 18 2023), at 3-4, https://www.southcentre.int/wp-content/uploads/2023/08/TCPB35_The-GloBE-Rules-Challenges-for-Developing-Countries-and-Smart-Policy-Options-to-Protect-Their-Tax-Base_EN.pdf.

⁹² BEPS Monitoring Group, *supra* note 91, at 5; Eze et al, *supra* note 91, at 5 ("Most developing countries apply standard rates on corporate income of 25%, 30% or higher. The effect of the QDMTT is to encourage countries to offer a rate of no more than 15% on excess profits that are declared in that jurisdiction. This encourages competition to reduce CIT rates, which may mean that the GloBE's 15% minimum becomes a maximum."); see also Global Alliance for Tax Justice, *supra* note 88.

⁹³ Stephanie Soong, "Multilateralism Crisis Mustn't Spread to Tax, Colombian Adviser Says," *Tax Notes International* 112:720-21 (Oct. 30, 2023) (tax experts noting complexity of the two-pillar solution).

⁹⁴ BEPS Monitoring Group, *supra* note 91, at 2 ("joining the scheme not be cost-effective for most of these countries."); Eze et al, *supra* note 91, at 3-4, ("[i]n view of the complex nature of the rules and the low capacities in some developing countries, it is doubtful

off signing on to the Two-Pillar solution despite being an Inclusive Framework member, has expressed concerns about complexity and difficulty of implementation, particularly in relation to likely benefits.⁹⁵

Concerns about complexity and implementation costs relate to the fact that, as the OECD and G20 have themselves acknowledged,⁹⁶ tax capacity in developing countries tends to be weaker, which suggests greater implementation challenges.⁹⁷ Recognizing this, the OECD and G20 have undertaken efforts to help developing countries with capacity building and BEPS reform implementation.⁹⁸ But developing countries may not view this support as sufficient to temper the complexity critique.

6. Inclusiveness, Process Concerns, and Choice of Forum for Global Tax Work

Throughout both phases of the BEPS project, developing countries have

whether such countries will truly benefit from the process.”). The South Centre emphasizes that Pillar Two creates a “dual regime where different rules may apply to MNEs, some in the same industry” and that “[t]his provides a potential significant challenge for the developing economies, with limitations in capacity and personnel, to handle the arbitrage that may result”). *Id.* at 3. *See also* Prastuti, *supra* note 85 (analyzing GloBE’s impact on Indonesia’s tax policy; noting high administrative costs) .

⁹⁵ Soong, *supra* note 9; *see also* Stephanie Soong, “‘Expectation Gaps’ Led Nigeria to Pull Out of OECD Tax Deal,” *Tax Notes Today International* 233-10 (Dec. 7, 2021) (Nigerian tax official noting “lack of tax administration capacity in developing countries, which will also affect implementation”). Nigeria did ultimately sign the July 2023 Outcome Statement on the Two-Pillar Solution, as of November 2023. *See* “Members of the OECD/G20 Inclusive Framework on BEPS that have approved the July 2023 Outcome Statement on the Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy as of 28 May 2024,” accessed June 20, 2024, <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-outcome-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-july-2023.pdf>; *see also* Federal Inland Revenue Service, “Outcome Statement from the OECD-Nigeria Two-Day Workshop on Maximizing the Benefits of the Two Pillar Solution for Nigeria,” (April 13, 2023), https://twitter.com/FIRS_Nigeria/status/1646500395378778117.

⁹⁶ Report for the G-20, *supra* note 60; OECD, *G20/OECD Roadmap on Developing Countries and International Taxation Update 2023: Report for the G20 Finance Ministers and Central Bank Governors*, (July 2023) [hereinafter “OECD 2023 Roadmap”], <https://www.oecd.org/tax/beps/g20-oecd-roadmap-on-developing-countries-and-international-taxation-update-2023-4fc33451-en.htm>.

⁹⁷ *See* sources cited *supra* note 96; *see also* OECD, “Meeting of the Advisory Group for Global Dialogue on Tax Matters: Statement of Outcomes,” (Apr. 8, 2022), <https://www.oecd.org/tax/tax-global/statement-of-outcomes-advisory-group-for-dialogue-on-tax-matters-meeting-8-april-2022.pdf>; (discussing developing country implementation and capacity challenges).

⁹⁸ *See, e.g.*, Stephanie Soong, “Tax Platform to Present Plan Supporting Global Tax Deal Adoption,” *Tax Notes Int’l* 111:78 (July 3, 2023) (discussing Platform for Collaboration on Tax plan to help developing countries with implementation).

complained about the inclusiveness of the process and the choice of forum.⁹⁹ Critics have argued that notwithstanding increased formal participation through the Inclusive Framework, developing countries have enjoyed limited actual influence, having been invited to participate only after the deal's key terms had been set.¹⁰⁰ The inclusiveness and process critiques contend that developing countries and their concerns were incorporated only as an afterthought, thus the substantive terms of the deal unsurprisingly reflect the preferences and priorities of the rich world.¹⁰¹ The implicit point is that a process in which developing countries had a more meaningful role would have incorporated their administrative realities and operational constraints into the reform's substantive design from the outset.

These process-based complaints influence the assessments of developing countries and their advocates concerning the BEPS reforms. For example, while developing country input did eventually influence the substance of Pillar Two (for example, through inclusion of the SBIE¹⁰² and QDMT and more capacity-building support), such gains are viewed as modest, incremental, not solely for the benefit of developing countries, and coming late in the game.¹⁰³

Recently, these process and inclusion complaints have gained traction and morphed into an active initiative to shift significant global tax reform work from the OECD to the UN.¹⁰⁴ That is, developing countries are pointing to

⁹⁹ See, e.g., "Letter from the Global Alliance for Tax Justice and the BEPS Monitoring Group to the OECD," *Tax Analysts* Doc. 2014-14210 (June 15, 2015), <https://www.taxnotes.com/beps-expert/base-erosion-and-profit-shifting-beps/international-tax-groups-address-beps-project-g-20-mandate/2015/06/18/hklp?highlight=BEPS%20%22G20%22%20%22developing%20countries%22%20%22rich%20countries%20club%22> (critiquing the OECD as a "rich countries' club").

¹⁰⁰ Rasmus Corlin Christensen, Martin Hearson, and Tovony Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations," *International Centre for Tax & Development Working Paper* No. 115 (Dec. 2020) at 10, <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations/> (reporting interviews with negotiators, policymakers and stakeholders); Tove Ryding, "Who is Really at the Table When Global Tax Rules Get Decided?," *Eurodad Network on Debt & Development* (May 1 2022), <https://www.eurodad.org/who-is-really-at-the-table-global-tax>.

¹⁰¹ See sources *supra* note 100.

¹⁰² See Victoria Perry, "Pillar 2: Tax Competition in Low-Income Countries and the SBIE," *Oxford Saïd Business School Working Paper* 2022-24 (Dec. 2022), <https://oxfordtax.sbs.ox.ac.uk/files/wp22-24-perry.pdf>.

¹⁰³ See Christensen, Hearson, and Randriamanalina, *supra* note 100, at 28-29 (discussing "small" and "incremental" gains by developing countries"); see also sources cited *supra* note 94 (outlining how new rules remain problematic for developing countries, even after modifications).

¹⁰⁴ See Sharon Katz-Pearlman, "And Still Not Boring: U.N. Pushes Tax Cooperation

the project's chosen forum as a contributing factor to their lack of influence.¹⁰⁵ The recent activity at the UN has been called “the latest development in an ongoing tussle between the United Nations and the Organisation for Economic Co-operation and Development over which organization should shape the global tax agenda.”¹⁰⁶

7. Failure to Address Deeper Systemic Problems

A final critique calls for more fundamental overhaul of the global tax and financial system to better address systemic problems that disadvantage developing countries. For example, the G-24 (a group of 24 developing countries) has called for “the creation of a more effective, inclusive, sustainable, and equitable international tax architecture, scaling up international tax cooperation, fighting illicit financial flows and combating aggressive tax avoidance and evasion with greater focus on capacity building to underpin [the] next wave of international tax reform.”¹⁰⁷ Representatives of various organizations advocating developing country interests agree that the two-pillar approach does not address “fundamental asymmetries” and problems that the overall system creates for developing countries.¹⁰⁸ The broader critique is that the OECD's two-pillar solution does not actually address these deeper problems.

There appears to be a direct line from critiques about administrability and

Framework Convention,” *Tax Notes International* 113:685-88 (Feb. 5, 2024) (reviewing UN involvement in global tax reform).

¹⁰⁵ Global Alliance for Tax Justice, *supra* note 88.

¹⁰⁶ Joanna Robin, “Africa Presses for UN Tax Plan Despite EU Resistance,” *International Consortium of Investigative Journalists* (Oct. 24, 2023), <https://www.icij.org/investigations/paradise-papers/africa-presses-for-un-tax-plan-despite-eu-resistance/>.

¹⁰⁷ G24 Communique, IMF (April 11, 2023), <https://www.imf.org/en/News/Articles/2023/04/11/g24-communique>. See also, UN, “Our Common Agenda Policy Brief 6: Reforms to the International Financial Architecture,” (May 2023) at 28, <https://sdgs.un.org/sites/default/files/2023-08/our-common-agenda-policy-brief-international-finance-architecture-en.pdf> (outlining “renewed calls for a fair and effective international tax system for sustainable development that reflects the concerns and capacities of all countries.”).

¹⁰⁸ Sarah Paez, “UN Is Best Place for International Tax Discussions, NGOs Say,” *Tax Notes International* 110:537-38 (April 24, 2023) (Third World Network representative noting that “the pillars ‘do not address . . . the asymmetries in an international tax architecture that prejudices developing countries in particular, and one which seeks to prevent them from imposing taxes on digital platforms.”; European Network on Debt and Development representative noting that “for source-country taxation that prioritizes developing countries to work, there needs to be a global tax system that works for developing countries.”); Steven A. Dean, “A Constitutional Moment in Cross-Border Taxation,” *Journal on Financing for Development* 1:1-15, at 13 (2021).

design choices as being insufficiently cognizant of developing country capacities and goals, to critiques about the process's lack of inclusiveness, to calls for a major change in venue, to demands to address the underlying shortcomings of the global tax and financial system. Even seemingly technical and procedural complaints ultimately point to deep alleged inadequacies in the system, even if not explicitly voiced as such.

B. Defenses and Counterarguments

Unsurprisingly, developing country criticisms have drawn counterarguments from the BEPS project's defenders. A key rejoinder has been that Pillar Two will eliminate the tax "race to the bottom" between countries, and that this will be particularly positive for developing countries because they are especially susceptible to revenue losses from BEPS abuses.¹⁰⁹ Pillar Two, it is argued, will save developing countries from having to compete among themselves using low rates, tax incentives and other concessions.¹¹⁰ It follows that developing countries should be *more* enthusiastic about Pillar Two than developed countries.

This argument is often wielded to fend off complaints that Pillar Two's revenue gains heavily benefit developed countries: The argument suggests that the relevant comparison is between how developing countries were faring before Pillar Two (when they had harmful tax incentives and accompanying tax revenue losses) and how they will fare after (when they will be able to eliminate those incentives). The argument also focuses on how developing countries will benefit from lessened tax competition vis-à-vis each other.¹¹¹ What the argument does *not* focus on is a comparison of

¹⁰⁹ See, e.g., Elodie Lamer, "Developing Countries Helped to Build Two-Pillar Plan, OECD Says," *Tax Notes International* 112:717-18, at 17 (Oct. 30, 2023) (quoting OECD Secretary General Mathias Cormann, "Developing countries stand to benefit significantly from the two-pillar solution.... With the global minimum tax under pillar 2, they will no longer be subject to inappropriate pressure to offer very low or no-tax arrangements to attract critically important investment."); Devereux & Vella, *supra* note 43 at 330-33 (detailing how design options considered for Pillar Two would prioritize either income shifting or tax competition, and noting that the SBIE rules adopted favored the former, which may not best reflect the goals of smaller, capital-importing countries).

See generally Mohammed Mardan and Michael Stimmelmayer, "Tax Competition between Developed, Emerging, and Developing Countries – Same Same but Different?," *Journal of Development Economics* 146 (September 2020): 102491, <https://doi.org/10.1016/j.jdeveco.2020.102491>. (tax competition impacts developing countries differently given their more limited ability to control MNE profit shifting).

¹¹⁰ See, e.g., Reuven Avi-Yonah and Young Ran Kim, "Tax Harmony: The Promise and Pitfalls of the Global Minimum Tax," *Michigan Journal of International Law*, no. 43.3 (2022): 505, at 548 <https://doi.org/10.36642/mjil.43.3.tax>.

¹¹¹ See Devereux & Vella, *supra* note 43 at 330-33.

developing and developed country tax revenue gains from the reform, the costs of the reform (including foregone FDI), and the difficulty of undertaking the reform for developing vs. developed countries.

Defenders have also praised the project's process and inclusiveness, arguing that the Inclusive Framework's creation and the G20's involvement constitute an unprecedented level of developing country input and participation in global tax negotiations.¹¹² Defenders also point to features of Pillar Two (e.g., the QDMT) that have been designed or modified based on developing countries' input as evidence of inclusiveness.¹¹³

The project's defenders also point to capacity-building assistance being afforded to developing countries, such as "toolkits" and "induction programs" to help them implement the BEPS reforms, training workshops and online courses, and assistance with building tax-audit capacity.¹¹⁴ This defense counteracts critiques that the reforms are too complex and implementation too costly, by emphasizing assistance offered to alleviate these burdens.

Finally, there are apparent inconsistencies in developing country critiques, which may appear to undercut them. For example, the complaint that developing countries will collect inadequate tax revenue seems at odds with the complaint that Pillar Two will lead to less FDI due to dismantling of revenue-draining tax incentives. Likewise, the concern that developed countries are the primary beneficiary of Pillar Two's tax revenues seems in tension with the complaint that the 15% rate is too low, as surely a higher rate would lead to even more revenues for developed countries. Finally, developing country complaints about having to abandon existing tax incentives seems in tension with observations by some developing country representatives that some tax incentives are inefficient and require reform.¹¹⁵

¹¹² See, e.g., Report for the G-20, *supra* note 60 at 13, 21 (noting that developing countries "not only have a seat 'at the table,' but also the potential. . . for a strong voice" and have been able to "play and active and influential role in international [tax] standard setting"); see generally, Nana Ama Sarfo and Stephanie Soong, "A New World Tax Order: The Inclusive Framework and Its Future," *Tax Notes International* 104:975-85 (Nov. 29, 2021) (providing history of the IF and its work).

¹¹³ See, e.g., Lamer, *supra* note 109 (quoting OECD Secretary-General Mathias Cormann); OECD 2023 Roadmap, *supra* note 96, at ¶1.2.5 Box 1.5,

¹¹⁴ See, e.g., OECD, "What is BEPS?" <https://www.oecd.org/tax/beps/about/#:~:text=Direct%20support%20on%20BEPS%20implementation,successfully%20implement%20their%20BEPS%20priorities> (last visited June 20, 2024); OECD 2023 Roadmap, *supra* note 96.

¹¹⁵ See, e.g., African Tax Administration Forum, "ATAF Suggested Approaches to Drafting Domestic Minimum Top-Up Tax Legislation" (2023) at 2, https://events.ataftax.org/index.php?page=documents&func=view&document_id=209&gl=1*xwa9xe*_ga*MTE5NzA3NTU0OS4xNzA3ODQ4Mzk2&_ga=2.104841216.1802282282.1707848396-1197075549.1707848396 ("[Pillar 2] may also relieve some of the pressure

The remainder of this Article seeks to make sense of these complaints and counterarguments by offering an interpretation that focuses on the wide historical gulf between developing and developed countries and how developing country criticisms and OECD and developed country responses reflect different evaluations of that gulf (Part III). It then explores the normative implications of this analysis (Part IV).

III. GLOBAL TAX REFORM'S UNDERLYING CONFLICT: A WIDE GULF BETWEEN RICH AND POOR COUNTRIES

This Part details the wide and historically constituted gulf between developing and developed countries, documenting its various aspects. Part III.A details the significant economic and other disparities between developing countries as a group and developed countries as a group but argues that these disparities have never been the main focus of the OECD/G20 tax reforms. Part III.B shows how these disparities have shaped the tax policy structures and priorities of developing vs. developed countries (including tax rates, tax base, and tax incentive design) and how global tax reform has tended to favor developed country tax practices. Part III.C argues that disparities between countries have also produced ordering differences in how differently-situated countries have received conventional wisdoms and been able to get their voices heard in the global tax negotiations.

A. *Disparities between Countries and the Distributional Politics of Global Tax Reform*

The wide disparities between developing and developed countries are well known. We argue, however, that these between-country disparities were never the underlying motivator for the BEPS project. Rather, the project was primarily driven by domestic concerns of developed countries post-financial crisis, a focus likely sharpened by the rise of “new global middle classes” in emerging economies such as India and China, which occurred as the fortunes of lower-middle classes in developed countries declined.¹¹⁶ This distinct but

African countries face to grant tax incentives, which in many cases, are inefficient and wasteful.”). The complexity of developing countries’ views on tax incentives was highlighted by recent debates over a UN committee discussion paper on Pillar 2 and developing country tax incentives. See Stephanie Soong, “Delegates Push Back on U.N. Work on Pillar 2 and Tax Incentives,” *Tax Notes International* 112:591-92 (Oct. 23, 2023).

¹¹⁶ Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2016). (chapter 1; describing the rise of the “global middle class”); Ho-fung Hung, “Recent Trends in Global Economic Inequality,” *Annual Review of Sociology* 47, no. 1 (July 31, 2021): 349–67, at 357-58, <https://doi.org/10.1146/annurev-soc-090320-105810>.

underappreciated distributional politics continues to shape global tax reform today.

1. Disparities between Rich and Poor Countries

Due to data limitations, most empirical work on global inequality focuses on income inequality, despite the obvious importance of other measures.¹¹⁷ Overall global income inequality has two components: between-country inequality, and within-country inequality.¹¹⁸ The recent consensus is that we are in currently in an era where—following decades of “high globalization”—within-country inequality is almost certainly rising, while between-country inequality may be falling.¹¹⁹ Within-country inequality for both developing and developed countries appears to have increased since the 1970s or 80s regardless of the measure used.¹²⁰ Although richer countries still

¹¹⁷ The growing literature on wealth inequality uses various strategies to address data limitations. See, e.g., Gabriel Zucman, “Global Wealth Inequality,” *Annual Review of Economics* 11, no. 1 (August 2, 2019): 109–38, at 110 <https://doi.org/10.1146/annurev-economics-080218-025852>; Lucas Chancel et al., *World Inequality Report 2022*, World Inequality Lab, at 9, https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_RAPPORT_A4.pdf (noting limited information about key aspects of inequality).

¹¹⁸ See Milanovic, *supra* note 116. Between-country inequality denotes the gap between per capita incomes in various countries and is usually measured using per capita income (GDP), with population-weighted purchasing power parity (PPP) measures becoming the “industry standard.” Hung, *supra* note 116 at 352–353; Glenn Firebaugh and Brian Goesling, “Accounting for the Recent Decline in Global Income Inequality,” *American Journal of Sociology* 110, no. 2 (September 2004): 283–312, at 290–91, <https://doi.org/10.1086/421541>. Within-country inequality denotes inequality between individuals within a single country and is usually measured using the Gini coefficient, with various strategies to overcome Gini-incomparability across countries. See, e.g., Frederick Solt, “Standardizing the World Income Inequality Database *,” *Social Science Quarterly* 90, no. 2 (June 2009): 231–42, at 234–38, <https://doi.org/10.1111/j.1540-6237.2009.00614.x>.

¹¹⁹ See Glenn Firebaugh, “Global income inequality,” in *Emerging Trends in the Social and Behavioral Sciences: An Interdisciplinary, Searchable, and Linkable Resource*, eds. Robert A. Scott et al., (John Wiley & Sons, Inc. 2015) 1–14; Ravi Kanbur, “Inequality in a Global Perspective,” *Oxford Review of Economic Policy* 35, no. 3 (July 11, 2019): 431–44, <https://doi.org/10.1093/oxrep/grz010>; cf. Maxim Pinkovskiy et al., “Inequality Within Countries Is Falling: Underreporting-Robust Estimates of World Poverty, Inequality and the Global Distribution of Income,” Working Paper, Working Paper Series (National Bureau of Economic Research, March 2024), <https://doi.org/10.3386/w32203>. (finding decline in within-country inequality since mid-2000s, including in China, India, and Indonesia; also finding decline in global inequality between 1980 and 2019).

¹²⁰ See Arthur S. Alderson & François Nielsen, “Globalization and the great U-turn: Income inequality trends in 16 OECD countries,” *American Journal of Sociology* 107, no. 5 (2002): 1244–1299; Arthur S. Alderson & Roshan K. Pandian, “What is Really Happening with Global Inequality?” *Sociology of Development* 4, no. 3 (2018): 261–281; Florian Dorn, “On Data and Trends in Income Inequality around the World,” *CESifo DICE Report* 14, no.

tend to have lower levels of within-country inequality than poorer countries, both appear to be experiencing rising within-country inequality.¹²¹

Yet, it remains generally the case that *between-country inequality* is the dominant driver of overall global inequality and the global distribution of income.¹²² Even studies that find the opposite emphasize that between-country inequality remains significant.¹²³ This implies, as others have noted, that the country where one is born and lives is a key factor in determining where one falls in the global income distribution.¹²⁴

Some studies indicate that global income inequality went down in the globalization era, with the decline driven by a decrease in between-country income inequality.¹²⁵ However, there is an important geographical dimension to these findings, with studies showing that the decrease in between-country inequality prior to around 2000 is largely attributable to Asia.¹²⁶ Since 2000, there is more unequivocal evidence of a decline in between-country

4 (2016).

¹²¹ See Alderson & Pandian, *supra* note 120. Other commentators concur regarding rising within-country inequality during globalization. See, e.g., Lucas Chancel *et al*, *supra* note 117; Dorn, *supra* note 120; Kanbur, *supra* note 119.

¹²² See Christoph Lakner and Branko Milanovic, “Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession,” *World Bank Economic Review* 30, no. 2 (2016): 203-232, <https://openknowledge.worldbank.org/handle/10986/29118>; Kanbur, *supra* note 119 at 434 (as of 2008, between-country inequality fell to 76.7% of global inequality, still very high, though down from 83.2% in 1988); see also Milanovic, *supra* note 116; Firebaugh & Goesling, *supra* note 118; Firebaugh, *supra* note 119. In contrast, before the Industrial Revolution global income distribution was largely attributable to within-country income inequalities. Alderson & Pandian, *supra* note 120.

¹²³ See, e.g., Lucas Chancel, *et al*, *supra* note 117, at 68; (finding, contra Milanovic & Lakner, that within-country inequality has become greater than between-country inequality around the turn of the 21st century but that the latter is still very high).

¹²⁴ See, e.g., Milanovic, *supra* note 116.

¹²⁵ Pinkovskiy *et al*, *supra* note 119; Firebaugh & Goesling, *supra* note 118; Brian Goesling, “Changing Income Inequalities Within and Between Nations: New Evidence,” *American Sociological Review* 66, no. 5 (2001): 745-761; Kanbur, *supra* note 119. Cf. Roberto Patricio Korzeniewicz & Timothy Patrick Moran, “World-Economic Trends in the Distribution of Income, 1965-1992,” *American Journal of Sociology* 102, no. 4 (1997): 1000-1039 (finding world income distribution became more unequal between 1965-1992, and the gap between wealthy and poor countries has grown since 1965, intensifying during the 1980s). There is some debate regarding timing—in particular, over whether the 1980s and 1990s saw actual decline in between-country inequality or whether it remained constant. Compare Rob Clark, “World Income Inequality in the Global Era: New Estimates, 1990–2008,” *Social Problems* 58, no.4 (2011): 565-592 and Milanovic, *supra* note 116 with Firebaugh & Goesling, *supra* note 118.

¹²⁶ Hung, *supra* note 116; Kanbur, *supra* note 119; Milanovic, *supra* note 116; United Nations, “Inequality – Bridging the Divide,” United Nations, accessed June 21, 2024, <https://www.un.org/en/un75/inequality-bridging-divide>. (income inequality improvements “can be accredited to strong economic growth in China and other emerging economies in Asia”).

inequality (robust regardless of whether China or India are included and how national income is measured),¹²⁷ but between-country inequality remains large and any reductions are not evenly distributed across countries.¹²⁸ The UN (2020) reports, for example, that the average income of people in North America remains 16 times higher than in Sub-Saharan Africa.¹²⁹ Moreover, average incomes in Sub-Saharan Africa and Southeast Asia are 31% and 50% of the global average, respectively, while in Europe and North America it is more than twice and three times the global average, respectively (measured in PPP).¹³⁰ Emerging research notes that the Covid-19 pandemic may have exacerbated global income inequality, and that the trend of declining between-country inequality since around 2000 may have reversed.¹³¹

Of course, income is not the only dimension of inequality. Developed countries tend to have advanced economies with well-established industrial bases and manufacturing and services sectors, good infrastructure, stronger government institutions and lower corruption.¹³² By contrast, developing countries tend to be more dependent on primary industries (such as agriculture or mining) and less economically advanced, to have more informal sector businesses, and to have weaker institutions and state capacities.¹³³ There are also important differences in education and

¹²⁷ Hung, *supra* note 116; Clark *supra* note 125; Alderson & Pandian, *supra* note 120.

¹²⁸ Dominik Paprotny, “Convergence Between Developed and Developing Countries: A Centennial Perspective,” *Social Indicators Research* 153, no. 1 (2021):193-225 (uneven convergence between Asia and Africa).

¹²⁹ United Nations, “Inequality in a Rapidly Changing World,” *World Social Report* (2020), <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/01/World-Social-Report-2020-FullReport.pdf>.

¹³⁰ Lucas Chancel et al., *supra* note 117, at 28. Other research agrees that income inequality between countries—as well as health, educational, and other inequalities—is still extremely high. See, e.g., *id.*; Max Roser, “Global Income Inequality,” *Our World In Data*, <https://ourworldindata.org/global-economic-inequality>; Andrew Stanley, “Global Inequalities,” *IMF* (March 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/03/Global-inequalities-Stanley> (noting extreme disparities).

¹³¹ See, e.g., “Global Income Inequality and the COVID-19 Pandemic in Three Charts,” World Bank Blogs, accessed June 21, 2024, <https://blogs.worldbank.org/en/developmenttalk/global-income-inequality-and-covid-19-pandemic-three-charts>. (noting considerable increase in between-country inequality and moderate increase in within-country income inequality in emerging market and developing economies).

¹³² See, e.g., Paul L. Baker, “An Analysis of the Corporate Income Tax Policy of Less Developed Countries,” *Scandinavian Journal of Economics* 120, no. 2 (2018):400-427; S.M. Ali Abbas & Alexander Klemm, “A Partial Race to the Bottom: Corporate Tax Developments in Emerging and Developing Economies,” *International Tax and Public Finance* 20 (2013): 596-617.

¹³³ See Abbas & Klemm, *supra* note 132, at 597-598.

healthcare, poverty and mortality rates, and access to clean drinking water.¹³⁴

2. The Distributive Politics of Inequality and Global Tax Governance

Despite these large differences between developing and developed countries along income and other dimensions, the distributional politics of the BEPS project reflects an agenda more attentive to the within-country inequality of developed countries than the gap between countries.

This distributional politics of the BEPS project is likely related to widespread perceptions regarding inequality and its relationship to globalization. While it is difficult to prove that globalization of trade and investment flows causes inequality or to isolate mechanisms linking the two,¹³⁵ the existence of *some* link, paired with perceptions of that link and growing within-country inequality, has been associated with a backlash against globalization and rise of populism in many countries.¹³⁶

These trends undoubtedly shaped post-2008 global tax governance. The BEPS project came into existence at a time when domestic crises in the rich world occupied the spotlight.¹³⁷ Despite the fact that between-country inequality is a big (and probably the greater) component of global inequality, it was domestic concerns of developed countries, including worries about within-country inequality, that motivated the BEPS reforms.

This asymmetric attention has likely been exacerbated by three factors: First, the fact that between-country inequality had arguably been declining, thus justifying inattention to it. Second, the fact that, at least until 2000, that decline had been largely fueled by the rise of a “new global middle class” in China, India, and other populous emerging economies,¹³⁸ and that this rise

¹³⁴ See, e.g., David E. Bloom, “The Shape of Global Health,” *Finance and Development* 51 no. 4 (2014): 6-12.

¹³⁵ We do not know what the level of global inequality would be if the level of globalization were different. Firebaugh, *supra* note 119 at 11. See also Milanovic, *supra* note 116 at 110-12 (noting difficulty of disentangling effects of globalization from effects of technology and policy due to endogeneity).

¹³⁶ See, e.g., Andreas Bergh & Therese Nilsson, “Do Liberalization and Globalization Increase Income Inequality?” *European Journal of Political Economy* 26, no.4 (2010):488-505 (finding correlations between inequality and variables indicating globalization, but not isolating causal mechanisms). Scholars disagree on whether the globalization-inequality link is direct or indirect. Hung, *supra* note 116.

¹³⁷ Christensen & Hearson, *supra* note 1; Sissie Fung, “The Questionable Legitimacy of the OECD/G20 BEPS Project,” *Erasmus Law Review* 10 (2017):76.

¹³⁸ Milanovic, *supra* note 116; Hagen Koo, “The Global Middle Class: How is it Made, What Does It Represent?” *Globalizations* 13, no.4 (2016):440-453; Homi Kharas and Geoffrey Gertz, “The New Global Middle Class: A Cross-Over from West to East,” in *China’s Emerging Middle Class: Beyond Economic Transformation*, ed. Cheng Li (DC: Brookings Institution Press, 2010).

came just when lower-middle classes in “old rich” countries experienced a decline in real income.¹³⁹ The comparative winners-and-losers dynamic between those cohorts likely fueled the rise of populism, the backlash against globalization, and the accompanying inward turn in many developed countries.¹⁴⁰

Third, a shift away from the nation-state as a unit of analysis in the inequality literature may be contributing to inattention to between-country inequality. This shift manifests, for example, in analyses that compare incomes of the “global top 10%” to the bottom half of the global population or that focus on wealth capture by “global multimillionaires and billionaires.”¹⁴¹ It can also be seen in studies that emphasize variation in within-country and within-region inequality across geographical regions.¹⁴² Intentional or not, these types of analyses shift emphasis away from inequality between nations and towards inequality among globalized individuals.¹⁴³ Yet, despite the aspirations of cosmopolitanism,¹⁴⁴ global tax

¹³⁹ Milanovic, *supra* note 116.

¹⁴⁰ See, e.g., Lukas F. Stoetzer, Johannes Giesecke & Heike Klüver, “How Does Income Inequality Affect the Support for Populist Parties?” *Journal of European Public Policy* 30, No. 1(2023):1-20; Sam Drabble et al., “The Rise of a Global Middle Class: Global Societal Trends to 2030: Thematic Report 6” (Rand Europe 2015), http://www.eu2050.eu/wp-content/uploads/2018/05/RAND_RR920z6.pdf (noting that while “support for peaceful international cooperation was a hallmark of older middle classes in Europe and beyond,” “the erosion of those middle classes appears to be taking place hand in hand with growing skepticism about Europe and the rise of nationalistic and isolationist political movements from Greece to the UK”; noting “new global middle classes” may embody conservative and that “polarisation of values may be slowly developing”); Dani Rodrik, “Populism and the Economics of Globalization,” *Journal of International Business Policy* 1, no. 1(2018):12-33 (discussing link between economic globalization shocks and populism); see also Christensen & Hearson, *supra* note 1 (connecting global power shifts and rise of austerity populism).

¹⁴¹ See, e.g., Chancel et al, *supra* note 117, at 26-27 (measuring income and wealth shares of different groups of individuals across the world); see also Facundo Alvaredo, Lucas Chancel, Thomas Piketty, Emmanuel Saez, and Grbriel Zuckan, *The Elephant Curve of Global Inequality and Growth*, 108: AEA PAPERS AND PROCEEDINGS 103-108 (2018) (analyzing income shares of top 10% and bottom 50% across the world from 1980-2016; finding that “the global top 1% has captured twice as much total growth than the bottom 50%” during this period.).

¹⁴² See, e.g., Chancel et al, *supra* note 117 at 30 (noting high levels of income inequality in regions with very wealthy elites next to extremely poor individuals in Latin America and Sub-Saharan Africa, on par with “inequality between world citizens”; concluding that “average standards of living [in a country or region] are a particularly unreliable determinant of inequality levels across the world.”).

¹⁴³ Compare MILTON L. FRIEDMAN, *THE WORLD IS FLAT, A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY*, NEW YORK: FARRAR, STRAUS AND GIROUX (2005) (“flat world” analysis de-emphasizing differences among individuals of similar incomes in different countries). While the political underpinnings of these inequality analyses may be different from Friedman’s, they may similarly undermine nation-state effects.

¹⁴⁴ See, e.g., Andrew Linklater, *Distant Suffering and Cosmopolitan Obligations*, 44(1)

cooperation remains fundamentally within the purview of nation-states.

In short, attention to within-country inequality and other domestic concerns of developed countries, combined with relative inattention to dramatic income inequalities between rich and poor countries, has been present since the very inception of the BEPS project. This tilt has persisted despite the involvement of the G20 (which, as Part I.B discussed, is not that representative of LMICs and LICs anyway).¹⁴⁵ Moreover, although the G20 charged the OECD with taking the project lead and endorsed the OECD's work,¹⁴⁶ the initial impetus and initiative on the BEPS project came from the OECD, not the G20.¹⁴⁷

We argue that inattention to significant inequality between rich and poor countries has led many commentators to underappreciate the fundamental critiques underlying developing country objections to the BEPS project. Many developed country perspectives emphasize Pillar Two's salutary impacts on the ability of developing countries to compete with *other developing countries*. But what they fail to appreciate is that complaints from a developing country vantage are more attentive to how the tax deal treats them unfairly *as compared to developed countries*, whose needs drove the project's formation.

B. Differences in Tax Structures between Rich and Poor Countries

The wide developing-developed country gulf is also reflected in differences in the tax systems and structures of developing and developed countries. The worry now is that developing country tax systems, which were shaped by significant economic, political, and institutional constraints, will be disparately affected by Pillar Two, which could in turn perpetuate or widen the gulf.

INT'L POLITICS 19-36 (2007).

¹⁴⁵ See *supra* I.B.

¹⁴⁶ OECD, "Part 1 of a Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries," 3 (July 2014), <https://www.oecd.org/tax/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf>. ("At the G20's request, the OECD is leading the development of a strategy to address base erosion and profit shifting (BEPS).").

¹⁴⁷ See, e.g., OECD, "G20: Global Forum and OECD report steady progress in international tax cooperation," (June 19, 2012), <https://www.oecd.org/g20/summits/los-cabos/g20globalforumandoecdreportsteadyprogressininternationaltaxco-operation.htm> ("OECD ...announced a new initiative [at 2012 G20 summit]. . . . The work will tackle. . . base erosion and profit shifting by some multinational firms. A progress report...will be presented to the next G20 Summit."); Sol Picciotto and the BEPS Monitoring Group, *The G20 and the "Base Erosion and Profit Shifting (BEPS) Project"*, GERMAN DEVELOPMENT INSTITUTE DISCUSSION PAPER No. 18/2017, 18-19, https://www.idos-research.de/uploads/media/DP_18.2017.pdf.

1. Tax Base and Rate Differences

It is well known that corporate taxes tend to constitute a higher portion of tax revenues for developing countries than developed ones, and that developed countries generate a greater proportion of revenues from personal income taxes and goods and services taxes.¹⁴⁸ Developing countries' reliance on corporate taxation is generally contrary to expert optimal tax recommendations, which suggest that consumption taxation is preferable to capital taxation (including corporate income taxation), that intermediate goods should not be taxed, and that top income tax rates should be low.¹⁴⁹

Commentators have noted that developing and developed countries' differential reliance on corporate taxes is partially attributable to obstacles developing countries face in relying on personal income taxes, such as limited administrative capacity, corruption, and economic structure.¹⁵⁰ For example, a large informal sector and elasticity of informal sector participation may render personal income taxation ineffective. By contrast, if capital-intensive firms benefit significantly from using the financial sector, they will not flee to the informal sector in response to corporate income taxes, so such taxes will be defensible, contrary to some optimal tax models.¹⁵¹ The decision to

¹⁴⁸ See, Baker, *supra* note 132; Abbas & Klemm, *supra* note 132; UN Secretariat Note, *The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals* (2018) at 8, <https://www.un.org/esa/ffd/wp-content/uploads/2018/08/CRP19-The-Role-of-Taxation-and-Domestic-Resource-Mobilization-in-the-Implementation-of-the-Sustainable-Development-Goals.pdf>; OECD, *Developing Countries More at Risk of Lost Corporate Tax Revenues* (Oct. 11, 2021), <https://www.oecd.org/coronavirus/en/data-insights/developing-countries-more-at-risk-of-lost-tax-revenues>.

¹⁴⁹ See Bernhard Reinsberg, Thomas Stubbs & Alexander Kentikelenis, "Taxing the People, Not Trade: the International Monetary Fund and the Structure of Taxation in Developing Countries," *Studies in Comparative International Development* 55, no. 3 (2020):278-304, 299 (citing Diamond and Mirrlees 1971, Manikw 2009, Mirrlees 2011). See also Roger Gordon and Wei Li, "Tax Structures in Developing Countries: Many Puzzles and a Possible Explanation," *Journal of Public Economics* 93, no. 7-8 (2009):855-856 (noting that under optimal tax models the efficiency-preserving tax structure will have no tariffs, no taxes on capital income (i.e., savings), uniform consumption taxes, and deflation).

¹⁵⁰ See, e.g., Vito Tanzi and Howell H. Zee, "Tax Policy for Emerging Markets: Developing Countries," *National Tax Journal* 53, no. 2(2000):299-300; see also *supra* notes 133-134.

¹⁵¹ See also M. Shahe Emran & Joseph E. Stiglitz, "On Selective Indirect Tax Reform in Developing Countries," *Journal of Public Economics* 89, no.4 (2005): 599-623 (questioning consensus advice for developing countries that favors increasing the VAT); Richard Byrd & Pierre-Pascal Gendron, *The VAT in Developing and Transitional Countries* (New York: Cambridge University Press, 2007); Michael Keen & Mario Mansour, "Revenue Mobilization in Sub-Saharan Africa: Challenges from Globalization," *IMF Working Paper* WP/09/157 (2009), <https://www.imf.org/external/pubs/ft/wp/2009/wp09157.pdf> ("Perhaps

use a corporate income tax may in some cases also have come at the urging of US multinationals seeking to ensure any tax imposed is creditable for US foreign tax credit purposes.¹⁵²

Corporate tax *rates* in developing countries also tend to be higher than the worldwide average. It is true that corporate tax rates for developing countries have declined, part of a downward trend in all regions since 1980.¹⁵³ Even with these across-the-board declines, developing countries continue to rely more heavily on corporate tax revenues than developed countries.¹⁵⁴

This reliance on corporate tax revenues paired with higher corporate tax rates in some developing countries animates developing country complaints

most important for developing countries, with limited administrative capacity, is that corporations provide a relatively easy tax handle. Since investment is typically strongly concentrated in a relatively small number of large corporations, the CIT is relatively easy to collect.”). Another implication is that where firms in different industries have differential reliance on the financial sector, the optimal corporate tax rate will vary by industry. Gordon & Li, *supra* note 149 at 857.

¹⁵² See, e.g., See, e.g., Lee A. Sheppard, “DeFANGed International Taxation, Part 2,” *Tax Notes International* 101 (2021): 1363 (Mar. 15, 2021) (noting pressures that led some countries to adopt the corporate income tax). See also David C.L. Nellor, “Taxation of Mineral and Petroleum Resources,” in *Tax Policy Handbook*, ed. Parthasarathi Shome (IMF 1995): 237, 238, <https://www.elibrary.imf.org/display/book/9781557754905/Ch06.xml> (observing that companies from jurisdictions with worldwide taxation want the state in which they invest to have creditable income taxes); Wayne Thirsk, “Overview: The Substance and Process of Tax Reform in Eight Developing Countries,” in *Tax Reform in Developing Countries*, ed. Wayne Thirsk, (World Bank, 1997) 1, 17 <https://documents1.worldbank.org/curated/en/672151468758144070/pdf/multi-page.pdf> (“the attempt [by a developing country] to introduce a more neutral cash flow business tax may incur the risk of being deemed noncreditable in those capital exporting countries that offer a foreign tax credit to their multinationals.”)

¹⁵³ See Elke Asen, *Corporate Tax Rates Around the World*, Tax Foundation Fiscal Fact No. 735 (Dec. 2020), <https://files.taxfoundation.org/20201208152358/2020-Corporate-Tax-Rates-around-the-World.pdf> (reporting corporate tax rates in Europe tend to be lower than elsewhere, while developing countries rates tend to be higher than worldwide average). Statutory and effective corporate tax rates in advanced economies fell and tax bases broadened from 1960-1999 though corporate tax revenues remained stable as a share of GDP. See Michael P. Devereux, Rachel P. Griffith & Alexander Klemm, “Corporate Income Tax Reforms and International Tax Competition,” *Economic Policy* 17, no.35 (2002):449-495 (2002). See also Kimberly A. Clausing, “Corporate Tax Revenues in OECD Countries,” *International Tax and Public Finance* 14 (2007):115-133; Mario Mansour, “Tax Policy in MENA Countries: Looking Back and Forward,” *IMF Working Paper* WP/15/98 (2015) at 23, <https://www.imf.org/external/pubs/ft/wp/2015/wp1598.pdf> (noting CIT rate decline). Abbas and Klemm find a fall in effective average corporate tax rates in all regions, and a gradual decline in effective marginal rates in all regions except Africa, where there was a “major reduction” (due to narrower tax bases). Abbas & Klemm, *supra* note 132 at 7.

¹⁵⁴ LDC corporate tax revenues as a percentage of total tax revenue increased between 1980-2006, despite a decrease in LDC statutory corporate tax rates. Baker, *supra* note 132 at 406. Developed countries experienced a decline in corporate tax revenues as a proportion of total tax revenues between 1980 and 1999. See Devereaux et al., *supra* note 153.

about the global minimum tax rate. As discussed in Part II.A.4, some view the rate as too low, and there is a widespread perception that the low rate is more aligned with the interests of developed countries, whose tax structures have been shaped by vastly different national circumstances. While the expert theoretical consensus may advise developing countries to change their tax structures to resemble those of developed countries, real-world constraints often make this unrealistic.

2. Design of Tax Incentives

In designing tax policies, countries consider not only revenue needs, but also their competitiveness in attracting business. To this end, all jurisdictions implement tax incentives of some kind. Developing countries, in particular, have had to consider how tax incentives impact economic development, and have had to design them under distinctive political, institutional, and administrative constraints.

a. Types of Tax Incentives Used to Attract Foreign Investment

A longstanding strand of thinking in development economics—but one especially prominent in the globalization era of the 1970s through the 1990s¹⁵⁵—posits that trade openness and liberalization of cross-border capital flows are important for development,¹⁵⁶ and that FDI is particularly beneficial.¹⁵⁷ FDI is private cross-border capital investment in which the investor has a significant equity ownership stake (commonly 10% or more) in the “host” country business.¹⁵⁸ Conventional wisdom posits that FDI not only provides financial capital backed by investors’ long-term commitment to a country (in contrast to short-term portfolio investments),¹⁵⁹ but it also

¹⁵⁵ See, e.g., Vanessa Ogle, “Archipelago Capitalism: Tax Havens, Offshore Money, and the States, 1950s–70s,” *American Historical Review* 122 no. 5 (2017): 1431–58.

¹⁵⁶ See Prakash Loungani & Razin Assad, “How Beneficial is Foreign Direct Investment for Developing Countries?,” *Finance & Development (IMF)* 38, no.2 (2001):6-9 <https://www.elibrary.imf.org/view/journals/022/0038/002/article-A003-en.xml>; Paul Krugman, “Cycles of Conventional Wisdom on Economic Development,” 71 *International Affairs* 71, no. 4 (1995):717-732, 729, https://cooperative-individualism.org/krugman-paul_cycles-of-conventional-wisdom-on-economic-development-1995-oct.pdf.

¹⁵⁷ See Loungani & Assad, *supra* note 156.

¹⁵⁸ World Bank Metadata Glossary, <https://databank.worldbank.org/metadataglossary/jobs/series/BX.KLT.DINV.WD.GD.ZS>; (defining FDI as a “lasting management interest (10 percent or more of voting stock) in an enterprise operating in an economy other than that of the investor.”)

¹⁵⁹ FDI is regarded as a more consistent source of capital given its significant ownership stakes and investors’ interest in long-term activities and profits in the capital-importing country. See Padma Mallampally and Karl P. Sauvnt, “Foreign Direct Investment

helps developing countries obtain technology transfers, gain training for the local workforce, and learn legal, organizational, and governance-related “best practices.”¹⁶⁰ Conventional wisdom also posits that the presence of FDI increases competition and reduces local monopolies. The removal of barriers to FDI was one of the key policies defining the so-called “Washington Consensus.”¹⁶¹ To be sure, the importance of FDI for development is not uncontested; critics argue that FDI stunts local industry and inadequately compensates developing countries for harms such as natural resources extraction.¹⁶² Despite such criticism, however, global FDI flows have increased rapidly since the 1980s,¹⁶³ as governments of both developing and developed countries liberalized their FDI regimes, reflecting acceptance of the conventional wisdom regarding FDI’s benefits.¹⁶⁴

Many developing countries have sought to attract FDI using tax incentives.¹⁶⁵ To be clear, however, it is not just developing countries but *all*

in Developing Countries,” *Finance & Development (IMF)* 36, no. 1 (1999):34-37, <https://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm> (noting FDI flows in 1997 Asian financial crisis remained positive or declined slightly, while bank lending and portfolio investment showed sharp declines).

¹⁶⁰ See, e.g., Loungani & Assad, *supra* note 156; Mallampally & Sauvant, *supra* note 159 (“Not only can FDI add to investable resources and capital formation [for developing countries], but, perhaps more important, it is also a means of transferring production technology, skills, innovative capacity.”)

¹⁶¹ See Douglas A. Williamson & Oliver Ward, “What is the ‘Washington Consensus’?”, *Peterson Institute for International Economics* (Sept. 8, 2021), <https://www.piie.com/blogs/realtime-economic-issues-watch/what-washington-consensus> (“Foreign investment allows a country to gain capital, create jobs, and build skills, while exposing domestic firms to greater competition. Domestic companies that tap foreign direct investment (FDI) can foster intellectual property innovations that contribute to development.”).

¹⁶² See, e.g., Yariv Brauner, “The Future of Tax Incentives for Developing Countries,” in *Tax, Law & Development*, eds. Yariv Brauner & Miranda Stewart (Cheltenham: Edward Elgar Press, 2013) (contesting importance of FDI for development and growth, and the importance of tax incentives in attracting it). See also Dirk Willem te Velde, “Foreign Direct Investment and Development: A Historical Perspective,” *Overseas Development Institute Background Paper* (Jan. 30, 2006), <https://cdn.odi.org/media/documents/850.pdf>.

¹⁶³ See Mallampally & Sauvant, *supra* note 159.

¹⁶⁴ See te Velde, *supra* note 162 at 2. “Efficiency seeking FDI” can be particularly valuable for developing countries, helping them achieve production transformations, diversify exports, and move up global production and technological chains. John H. Dunning, “Toward an Eclectic Theory of International Production: Some Empirical Tests,” *Journal of International Business Studies* 11 (1980): 9-31 (delineating types of FDI); Cecile Fruman, “Why Does Efficiency Seeking FDI Matter?,” *World Bank Blogs* (Feb. 5, 2016) <https://blogs.worldbank.org/psd/why-does-efficiency-seeking-fdi-matter>. By contrast, some argue that natural resource-seeking FDI exploits host country resources without corresponding development gains. See te Velde, *supra* note 162 at 2.

¹⁶⁵ Brown, *supra* note 66 (observing that developing countries need FDI for development, have used tax incentives to attract it, and have entered investment agreements

countries that have used some form of tax incentives to attract FDI.¹⁶⁶ But there are important differences in the types of incentives used by developed and developing countries, and a key criticism of Pillar Two is how it treats the respective types of incentives differently.

Tax holidays—which exempt investors from paying income tax for some time period (often years)—are the most common form of tax incentive in developing countries.¹⁶⁷ In fact, they are the most common tax incentive, prevalent across the globe except for OECD countries.¹⁶⁸ The use of tax holidays has evolved over time and varies by region. Fewer countries offered them in 2014 than in 2000, with the most marked reduction among OECD countries.¹⁶⁹ The use of tax holidays and special enterprise zones (“SEZs”), however, increased in Sub-Saharan Africa between 2005 and 2014, where countries offered holidays in SEZs to target certain businesses or sectors.¹⁷⁰

In contrast, OECD countries tend to rely more on generous loss carryforwards and carrybacks rather than tax holidays, as well as on investment allowances (i.e., letting investors deduct certain capital investment costs above normal depreciation), accelerated depreciation, specific corporate tax deductions, and tax credits.¹⁷¹ Of course, some

and private contracts that limit their ability to change tax laws).

¹⁶⁶ Sebastian James, “Effectiveness of Tax and Non-Tax Incentives and Investments: Evidence and Policy Implications,” *Working Paper* (Sept. 2013; updated Sept. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401905

¹⁶⁷ Sebastian James, “Tax Incentives Around the World,” in *Rethinking Investment Incentives: Trends and Policy Options*, eds. Anna Teresa Tavares-Lehman et al. (New York: Columbia University Press, 2016); Eric Zolt, “Tax Incentives: Protecting the Tax Base,” *Working Paper* (2015), at 4, https://static.un.org/esa/ffd/wp-content/uploads/2015/04/2015TIBP_PaperZolt.pdf; Eric Zolt, “Tax Incentives in a BEPS World,” *Draft Paper* (May 20, 2014), https://www.un.org/esa/ffd/wp-content/uploads/2014/10/20140604_Paper3_Zolt.pdf; David Holland and Richard J. Vann, “Income Tax Incentives for Investment,” in *Tax Law Design and Drafting* Vol. 2, ed. Victor Thuronyi (IMF 1998), <https://www.imf.org/external/pubs/nft/1998/tlaw/eng/ch23.pdf>.

¹⁶⁸ James, *supra* note 166, at 9, 11; James, *supra* note 167 (Chapter 7).

¹⁶⁹ James, *supra* note 166, at 9, 11 (noting “the gradual move away from the use of tax holidays among the developed countries due to their ineffectiveness in aligning the incentives of increased investment with tax benefits.”); James, *supra* note 167 (Chapter 7).

¹⁷⁰ James, *supra* note 166, at 11; James, *supra* note 167 (Chapter 7 and Table 7.3); National Treasury, Republic of South Africa, “Special Economic Zones,” *IREP Issue Brief* 7/14, <https://www.treasury.gov.za/gtac/SEZs.pdf>. See also generally Keen and Mansour, *supra* note 151), at 19-21 <https://www.imf.org/external/pubs/ft/wp/2009/wp09157.pdf> (discussing tax holiday and free zones in Sub-Saharan Africa); Mansour, *supra* note 153, at 27 (noting use of “free-zone laws” in MENA countries).

¹⁷¹ James, *supra* note 166, at 12; James, *supra* note 167 (Chapter 7); Zolt (2014), *supra* note 167; Zolt (2015), *supra* note 167; OECD, “Tax Incentives for Investment: A Global Perspective Experiences in MENA and Non-MENA Countries,” in *Making Reforms Succeed: Moving Forward with the MENA Investment Policy Agenda* (Paris: OECD Publishing, 2008), 225, 233, <https://www.oecd-ilibrary.org/finance-and-investment/making->

countries in other regions (including East Asia and the Pacific, Sub-Saharan Africa, and South Asia) do use investment allowances and tax credits as well.¹⁷² The differences between how countries use tax incentives is detailed in a 2015 IMF report, which observes that high-income countries rely more on investment tax credits and R&D incentives, low-income countries tend to rely more on tax holidays and lower tax rates, and middle-income countries often use special economic zones.¹⁷³

As discussed in Part II, commentators have expressed concern that Pillar Two will heavily impact tax holidays and export processing zones, which are more widely used by developing countries.¹⁷⁴ By contrast, the types of incentives more commonly deployed by developed countries will be less affected.

b. But Should Tax Incentives be Used?

An obvious counterargument is that the tax incentives used by developing countries are costly, ineffective in attracting FDI, and are only needed because of tax competition and the race-to-the-bottom, which Pillar Two will eliminate.¹⁷⁵ But this may be an oversimplification. To be sure, there are serious questions about whether tax incentives attract FDI effectively.¹⁷⁶ Some studies suggest that tax incentives may not work as well in developing countries as in developed countries, particularly if the broader investment climate is weak.¹⁷⁷ For example, studies have shown that tax incentives are

[reforms-succeed/tax-incentives-for-investment-a-global-perspective-experiences-in-mena-and-non-mena-countries_9789264052826-11-en](#) (“In OECD countries, accelerated depreciation, specific deductions for corporate income-tax purposes, and reductions in other taxes (including state and local) are the next most widely used (in descending order) [after corporate tax rate reductions].”)

¹⁷² James, *supra* note 167 (Chapter 7; Table 7.1); Keen & Mansour, *supra* note 170, at 19-20.

¹⁷³ IMF, *supra* note 84. See also James, *supra* note 167 (Chapter 7) (noting that “fewer countries in Sub-Saharan Africa offered tax incentives through investment codes or other sectoral laws in 2014, with more of the incentives being provided through the tax laws....”).

¹⁷⁴ See, e.g., Christians, et al., *supra* note 37, at 42; Readhead, et al., *supra* note 69.

¹⁷⁵ See, e.g., Avi Yonah, *supra* note 15, at 109.

¹⁷⁶ See, e.g., Nathan Jensen, *Nation States and the Multinational Corporation: A Political Economy of Foreign Direct Investment* (New Jersey: Princeton University Press, 2006); Vito Tanzi & Howell H. Zee, *supra* note 150; Chigozie Andy Ngwaba, “Corporate Taxes and FDI in Developing Economies,” *International Economics and Economic Policy* 20, no. 4 (2023): 613-33.

¹⁷⁷ IMF (2015), *supra* note 84, at 3, 35; Jacques Morisset and Neda Pirnia, “How Tax Policy and Incentives Affect Foreign Direct Investment,” *World Bank and International Finance Corporation Foreign Investment Advisory Service Policy Research Working Paper* 2509 (Dec 2000), <https://core.ac.uk/download/pdf/6615449.pdf>; Robert J. Rolfe and Richard

effective for attracting FDI in Latin America and the Caribbean but not in Africa, which may be attributable to stronger investment climates in the former.¹⁷⁸ Political institutions may affect the FDI decisions of multinationals more strongly than fiscal incentives.¹⁷⁹ There is also evidence that FDI's responsiveness to tax incentives varies by investment type, with export-oriented and efficiency-seeking FDI more sensitive to tax incentives than domestic-oriented investment.¹⁸⁰ This suggests that poorly targeted tax incentives might be wasteful.

However, there are also important responses to those counterarguments. Tax incentives may help correct market failure, including where the FDI would generate positive externalities.¹⁸¹ For example, promoting research and development and high-tech industries in underdeveloped regions could generate such externalities.¹⁸² Depending on the returns (and on externalities created), it might be more optimal for a developing country to deploy investment incentives than invest in public goods.¹⁸³ Tax incentives may also serve a signaling function to prospective investors and may disincentivize firms from fleeing into the informal sector.¹⁸⁴ If political and tax avoidance considerations require developing countries to impose a uniform tax rate on mobile and less-mobile capital income, tax incentives may help a country

A. White, "Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study," *Journal of the American Taxation Association* 14, no. 1(1992) (tax factors alone cannot overcome unfavorable nontax factors).

¹⁷⁸ Compare Alexander Klemm and Stefan Van Parys, "Empirical Evidence on the Effects of Tax Incentives," *International Tax and Public Finance* 19 (2012): 393-423; with Stefan Van Parys & Sebastian James, "The Effectiveness of Tax Incentives in Attracting Investment: Panel Data Evidence from the CFA Franc Zone," *International Tax and Public Finance* 17(2010): 400-29; and Stefan Van Parys & Sebastian James, "The Effectiveness of Tax Incentives in Attracting FDI: Evidence from the Tourism Sector in the Caribbean," *Universiteit Gent Working Paper* (2010): 2010/675, https://wps-feb.ugent.be/Papers/wp_10_675.pdf.

¹⁷⁹ Jensen, *supra* note 176.

¹⁸⁰ John Mutti and Harry Grubert, "Empirical Asymmetries in Foreign Direct Investment and Taxation," *Journal of International Economics* 62, no. 2 (2004): 337-358; Andersen, Kett & von Uexkull, *supra* note 84.

¹⁸¹ Tanzi & Zee, *supra* note 150, at 315 (2000); James, *supra* note 166, at 33.

¹⁸² See sources *supra* note 181; see also Yoram Margalioth, "Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries," *Virginia Tax Review* 23(2003):161.

¹⁸³ James, *supra* note 166, at 31-32.

¹⁸⁴ Joosung Jun, "Tax Incentives and Tax Base Protection in Developing Countries," *United Nations ESCAP* (2017) 8-9, <https://www.unescap.org/sites/default/d8files/knowledge-products/Tax%20Incentives%20and%20Tax%20Base%20Protection%20in%20Developing%20Countries.pdf> (discussing signaling effects of tax incentives); *id.* at 6 ("investment incentives that appear to be more generous than warranted...can ...keep[] firms from shifting into the informal sector or abroad").

effectively differentiate between them.¹⁸⁵

More generally, there is a paucity of literature on the effectiveness of tax and investment incentives in developing countries, with most studies focusing on developed countries.¹⁸⁶ Existing studies show that tax incentives have *some* effects on FDI for some developing countries, though this varies by context and may be limited for certain countries.¹⁸⁷ Moreover, some suggest that institutional quality may matter less for developing than developed countries.¹⁸⁸

There are also two important real-world considerations that cut against a view that tax incentives should not be used. First, while improvements to infrastructure, governments, and investment climate may be more helpful than incentives for attracting FDI,¹⁸⁹ the ability of many developing countries to make these improvements is low, so tax incentives may be a necessary second-best option.¹⁹⁰ And tax expenditures might be politically easier to implement than direct funding.¹⁹¹

Second, as to the choice *among* tax incentives, many developing countries are constrained in the types of incentives they can use, which may partially explain the turn to tax holidays despite their risks. A 2000 UN survey notes that while “[d]eveloped countries ... more frequently employ financial incentives such as grants, subsidized loans or loan guarantees”, “[i]t is

¹⁸⁵ Elisabeth Gugl & George R. Zodrow, “International Tax Competition and Tax Incentives for Developing Countries,” in *The Challenges of Tax Reform in a Global Economy*, eds. Jorge Martinez-Vazquez, James Alm, Mark Rider (Springer, 2006): 167-191.

¹⁸⁶ James, *supra* note 166, at 6.

¹⁸⁷ IMF, *supra* note 84, at 11; James, *supra* note 166, at 15-20 (discussing investment climate). See also Afton Titus and Tracy Gutuza, “The Relationship between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right? *Acta Juridica* 2018 no. 1(2018):149-182 (examining whether African countries are factoring in human rights commitments when offering tax incentives).

¹⁸⁸ Samina Sabir, Anum Rafique, and Kamran Abbas, “Institutions and FDI: Evidence from Developed and Developing Countries,” *Financial Innovation* 5, no. 8 (2019):1-20 (concluding that while institutional quality positively impacts FDI in all countries, the effects are larger in developed countries).

¹⁸⁹ See, e.g., Morisset & Pirnia, *supra* note 177; Jensen, *supra* note 176; Andersen, Kett and von Uexkull, *supra* note 84.

¹⁹⁰ Jun, *supra* note 184, at 3. See also Afton Titus, “Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies,” *Intertax* 50, no. 5 (2022):414-423 (Pillar Two efforts to eliminate tax competition through tax incentives should be revised to recognize the distinct role of incentives in developing countries).

¹⁹¹ James, *supra* note 166, at 51 (tax incentives “are a less visible way for governments to provide special benefits to certain businesses” and “are easier to provide than infrastructure, labor skills, or other investment climate improvements”); OECD, *supra* note 171, at 229; see also Mansour, *supra* note 153, at 27 (noting political economy explanations for tax incentives in MENA countries).

generally recognized that financial incentives are a direct drain on the government budget, and as such, they are not generally offered by developing countries to foreign investors. Instead, these countries tend to use fiscal incentives that do not require upfront use of government funds.”¹⁹² Similarly, the 2003 UN World Investment Report notes that “[i]n general, developed countries and economies in transition frequently employ financial incentives, while developing countries (which cannot afford a direct drain on the government budget) prefer fiscal measures.”¹⁹³ Another consideration may be capacity constraints and the existence of corruption in some developing countries; tax incentives that minimize contact with tax authorities might be preferred by inbound businesses.¹⁹⁴

Finally, it is important recognize that tax holidays are consistent with earlier advice developing countries received from international organizations and experts regarding the design and use of tax incentives to attract FDI. As Part III.C will develop further, in the post-World War 2 environment, prior to the emergence of the Washington Consensus and the “BBLR” (broader base, low rates) conventional wisdom, the use of tax incentives in the development process was countenanced by many developed countries experts. In light of prior conventional wisdom, their continued use in many developing countries is unsurprising.

c. Summary

Developing countries’ tax incentives may not work as well as governments hope, but there is compelling evidence that these jurisdictions are constrained in the types of incentives they can realistically offer and in their ability to attract FDI via non-tax factors like workforce or institutions. Furthermore, developing countries may face barriers in removing longstanding incentives where existing investment treaties commit to continuing availability.¹⁹⁵

More fundamentally, arguments that Pillar Two will eliminate tax competition *among developing countries* miss the crux of the issue, which is that Pillar Two will not help, and may in fact worsen, developing countries’

¹⁹² United Nations Conference on Trade and Development, “Tax Incentives and Foreign Direct Investment: A Global Survey,” *ASIT Advisory Studies* No. 16, UNCTAD/ITE/IPC/Misc.3 at 11-12, https://unctad.org/system/files/official-document/iteipcmisc3_en.pdf.

¹⁹³ United Nations Conference on Trade and Development, *World Investment Report 2003* (2003) at 124, https://unctad.org/system/files/official-document/wir2003_en.pdf.

¹⁹⁴ James, *supra* note 167 (“businesses might also favor tax holidays because... there is a reduced requirement... to deal with the tax authorities (in some countries, taxpayers are not even required to file tax returns).”).

¹⁹⁵ See sources cited *supra* note 66.

ability to maintain tax competitiveness vis-à-vis developed countries.¹⁹⁶ While developing countries have become more attractive to FDI since the 1980s, much of the world's FDI remains held in developed countries.¹⁹⁷ In 2022, FDI inward stock—the value of foreign debt and equity investment in the reporting country—in developed economies was US\$29,093,016 million while for developing economies it was US\$15,159,744 million.¹⁹⁸ Plus, developing country FDI has been more harshly affected by recent geopolitical fragmentation and “friend-shoring” trends,¹⁹⁹ and may be more susceptible to certain risks than developed countries.²⁰⁰ In short, while tax competition among developing countries may be important, tax competition between developing and developed countries is no less important.

Yet, in addition to leaving unchecked many tax incentives favored by developed countries, the BEPS project has done nothing to stop the nontax ways in which developed countries can compete (such as industrial policy) that are not practically available to developing countries. While the effectiveness of developing country tax incentives may be debated, the fact that global tax reform may limit the ability of some states more than others to incentivize business is troubling.

3. Capacity Constraints

It is well understood that developing countries have more constrained tax capacity than developed ones. Tax capacity speaks to the resources, skills, and expertise of both the government and taxpayers and its precise contours may vary.²⁰¹ Typical measures of state capacity include resources to hire and train staff and fund other costs (e.g., travel, experts, etc.), ability to access and implement technology, depth of staff expertise, and ability to retain experienced personnel. Despite the frequent focus on the state's capacity, the

¹⁹⁶ See Dagan, *supra* note 2, at 638.

¹⁹⁷ See United Nations Conference on Trade and Development, *World Investment Report 2023* (2023), at 200, https://unctad.org/system/files/official-document/wir2023_en.pdf (Annex Table 2, reporting FDI inward stock for developed and developing economies).

¹⁹⁸ *Id.*

¹⁹⁹ JaeBin Ahnb, Ashique Habib, Davide Malacrino & Andrea F. Presbitero, “Fragmenting Foreign Direct Investment Hits Emerging Economies Hardest,” IMF Blog (Apr.5, 2023), <https://www.imf.org/en/Blogs/Articles/2023/04/05/fragmenting-foreign-direct-investment-hits-emerging-economies-hardest>.

²⁰⁰ Simon J. Evenett & Johannes Fritz, “Declining Foreign Direct Investment Can’t Contribute Much to Sustainable Development,” Brookings (June 2021), <https://www.brookings.edu/articles/declining-foreign-direct-investment-cant-contribute-much-to-sustainable-development/>.

²⁰¹ See generally IMF, OECD & World Bank, *Supporting the Development of More Effective Tax Systems: A Report to the G-20 Developing Working Group* (2011) 10-18, <https://www.imf.org/external/np/g20/pdf/110311.pdf>.

capacity of a country's taxpayers also impacts the kinds of taxes that may realistically be implemented. Tax capacity has been linked to a state's ability to "achiev[e] the Sustainable Development Goals (SDGs), address[] climate change, and ensur[e] debt sustainability."²⁰²

A variety of actors, including international organizations, regional bodies, civil society groups, and other countries, have sought to provide tax capacity building support to developing countries.²⁰³ Unsurprisingly, reactions to this support and assessments of its success vary.

Concerns about tax capacity surface in developing country complaints about the administrative complexity and implementation costs of BEPS reforms. But they also underlie complaints about process and inclusiveness: for example, about travel costs of participation, the limited time allowed to process and evaluate proposals, and the challenges for countries with smaller staff to engage in dialogue. These points speak to barriers developing countries face in meaningfully intervening in global tax negotiations.²⁰⁴

C. Power, Process, and Ordering Effects of the Gulf

²⁰² Juan Carlos Benitez, Mario Mansour, Miguel Pecho & Charles Vellutini, "Building Tax Capacity in Developing Countries," *IMF Staff Discussion Note* 2023, no.6 (2023), <https://www.elibrary.imf.org/view/journals/006/2023/006/article-A001-en.xml>. See also Karen B. Brown, "Tax Incentives and Sub-Saharan Africa," *Pepperdine Law Review* 48(2021):995-1022 (urging reconfiguration of BEPS to be more responsive to the SDG-based needs of Sub-Saharan Africa).

²⁰³ Examples include the UN, OECD, African Tax Administration Forum, the World Bank Group, and the United Kingdom. See UN Tax Capacity Development Unit, "About Capacity Development," <https://financing.desa.un.org/capacity-development/about-capacity-development> (last visited Jan.31, 2024); Report for the G20, *supra* note 60 at 31.; ATAF, "Technical Assistance," <https://www.ataftax.org/technical-assistance> (last visited Jan. 31, 2024); World Bank, Press Release: "Platform for Collaboration on Tax," (Mar. 31, 2020), <https://www.worldbank.org/en/programs/platform-for-tax-collaboration.print#:~:text=WBG%20support%20for%20capacity%20building,reflecting%20local%20circumstances%20and%20needs>; HMRC Capacity Building Unit: evaluation (April 2020 to March 2022) (June, 26, 2023), <https://www.gov.uk/government/publications/hmrc-capacity-building-unit-and-tax-expert-unit-annual-evaluation/hmrc-capacity-building-unit-evaluation-april-2020-to-march-2022>; OECD, "Tax Inspectors without Borders: TWIB Objective," <https://www.tiwb.org/about/> (last visited Feb.14, 2024) (joint endeavor of the OECD and UN seeking to "enable sharing of tax audit knowledge and skills with tax administrations in developing countries through a targeted, real time "'learning by doing' approach" with the aid of "selected experts.").

²⁰⁴ See, e.g., Irma Johanna Mosquera Valderrama, "About the BEPS Inclusive Framework and the role of the OECD," *GlobalTaxGov* (Nov. 19, 2019), <https://globtaxgov.weblog.leidenuniv.nl/2019/11/19/about-the-beps-inclusive-framework-and-the-role-of-the-oecd/> (discussing some of these barriers). See also Sarfo & Soong, *supra* note 112; Nana Ama Sarfo & Stephanie Soong, "A Brave Bet: The Inclusive Framework's High-Stakes Future," *Tax Notes International* 104:1326-1336 (Dec. 20, 2021).

The wide gulf between developing and developed countries is also visible in how developing countries have historically received conventional wisdoms and been able to have their voices heard in global tax negotiations.

1. Evolving Expert Advice and Conventional Wisdoms

The wide gulf between developing and developed countries manifests in differing influence in international relations and negotiations, differing control over international organizations (including the OECD), and differing influence over globalized norms, practices, and conventional wisdoms.²⁰⁵ Developing countries have long been recipients of advice and influence from experts and international organizations on how to “do development” and how to reform their tax systems to that end.²⁰⁶ Predominantly shaped by US and European perspectives and experiences, this advice has influenced the trajectories of tax reform in many developing countries over the last century.²⁰⁷ Importantly, the content and emphasis of tax reform advice to developing countries has evolved. The literature records shifting views on the appropriate role of the state and of tax policy in directing economic development and shifting theoretical perspectives on how to design and evaluate tax systems.²⁰⁸

These shifts and their effects can be seen in changing conventional wisdoms regarding the importance of FDI in development and how tax policies should be designed to attract it. Post-WW2, as newly independent former colonies confronted nation-building and financing the state, conventional wisdom envisioned that FDI would play an important role in

²⁰⁵ See, e.g., Sarfo and Soong, *supra* note 204 (asking how developing countries can “move from participants [in BEPS via the Inclusive Framework] to power brokers?”).

²⁰⁶ See Roel Dom and Mark Miller, “Reforming Tax Systems in the Developing World: What Can We Learn from the Past?” *ODI Research Report* (June 26, 2018), <https://odi.org/en/publications/reforming-tax-systems-in-the-developing-world-what-can-we-learn-from-the-past/>; Richard Goode, “Tax Advice to Developing Countries: A Historical Survey,” *World Development* 21, no. 1 (1993): 37-53; Richard M. Bird, “Foreign Advice and Tax Policy in Developing Countries,” in *Taxation and Development: The Weakest Link? Essays in Honor of Roy Bahl*, eds. Richard M. Bird and Jorge Martinez-Vazquez (Cheltenham: Edward Elgar, 2014) 103-44, <http://ndl.ethernet.edu.et/bitstream/123456789/56505/1/Richard%20M.%20Bird.pdf>; Roy W. Bahl & Richard M. Bird, “Tax Policy in Developing Countries: Looking Back—and Forward,” *National Tax Journal* 61 no. 2 (2008): 279-301, 283 (noting the “copy my country” approach).

²⁰⁷ See, e.g., Vicki Beyer, “The Legacy of the Shoup Mission: Taxation Inequities and Tax Reform in Japan,” *Pacific Basin Law Journal* 10 (1991):388.

²⁰⁸ See Dom and Miller *supra* note 206 at 8. See also Goode, *supra* note 206; Miranda Stewart, “Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries,” *Harvard International Law Journal* 44 (2003):139-190; Bird, *supra* note 206; Bahl & Bird, *supra* note 206.

development.²⁰⁹ The expectation that tax regimes applicable to foreign investors would significantly impact FDI flows was explicitly discussed and promoted by the World Bank, IMF, and tax experts.²¹⁰ While FDI was understood to carry risks for developing countries (hence an accompanying interest in new norms, codes and legal regimes),²¹¹ it was nonetheless expected to be of significant value to participants in a global economy.²¹²

The conventional wisdom regarding FDI's importance was directly tied to advice regarding tax system design and use of tax incentives. In the post-WW2 environment—during which a more interventionist role for the state in fostering development was envisioned—tax policy was viewed as a important instrument in shaping development trajectories.²¹³ Tax incentives were historically a key recommendation for development by experts and international organizations.²¹⁴ This contrasted with a later shift towards efficiency and neutrality, and advising that tax systems be designed to have a broad base and low rates (“BBLR”), essentially undoing the effects of the earlier “development model.”²¹⁵ To summarize: while the “development model” contemplated more state involvement, it was displaced by a “small state” ideal as the world approached the era of globalization.²¹⁶

It is important to recall this post-WW2 advising dynamic, because it has been too easy for today's tax experts to say that tax holidays and incentives

²⁰⁹ See Ogle, *supra* note 155; Vanessa Ogle, “‘Funk Money’: The End of Empires, The Expansion of Tax Havens, and Decolonization as an Economic and Financial Event,” *Past & Present* 249, no. 1 (2020):213-249.

²¹⁰ See Mallampally & Sauvart, *supra* note 159 (discussing FDI's benefits for developing countries). A 1992 World Bank report provided legal guidelines for FDI, “because of the growing importance of private direct foreign investment in development countries” and “the great transformation of economies in Eastern Europe, Central Asia, and indeed many developing countries, from inward looking economies...into outward looking market economies...” World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, 31 INTERNATIONAL LEGAL MATERIALS 1363, 1368-69 (1992).

²¹¹ World Bank, *supra* note 210 (introductory note).

²¹² See, e.g., IMF, “Tax Policy and Reform for Foreign Direct Investment in Developing Countries,” *IMF Working Paper* WP/90/70 (July 1990) (identifying and evaluating tax and “nontax factors instrumental in attracting foreign investment”).

²¹³ Stewart, *supra* note 208, at 168-69 (noting that “[t]he post-World War II economic development strategy of many developing countries” was “one in which the state largely managed the process of economic growth, giving high priority to the goals of industrialization, diversification, and modernization” and that “all taxes, including trade taxes, were legitimate tools of the state in this development process” (citing Dharam Ghai, “Introduction” in *The IMF and the South: The Social Impact of Crisis and Adjustment*, ed. Dharam Ghai (London: Zed Books, 1991), 3.

²¹⁴ Stewart, *supra* note 208, at 168, 178.

²¹⁵ *Id.* at 169.

²¹⁶ *Id.* at 168-76.

are harmful, expensive, and ineffective and that developing countries should seize the Pillar Two opportunity to get rid of them.²¹⁷ It is also too easy to contextualize the virtue of eliminating tax incentives amid BBLR discourse, while not acknowledging that the very existence of such incentives was partially shaped by an earlier era of advising and that the BBLR recommendation represents a subsequent shift.

Even in the 1970s and beyond, expert and international organization advice was not uniformly against tax incentives. Developing countries received advice to broaden their tax bases and eliminate tax incentives (consistent with the “Washington consensus”)²¹⁸ but the advice simultaneously acknowledged how this was unrealistic for some countries.²¹⁹ For example, a 1990 IMF working paper recognized the importance of competition pressures to attract FDI²²⁰ and the potential value of incentives in attracting it:

“[G]overnments which want foreign investment to play a role in their development programs are well advised to design their tax structures with an eye to the taxation level in countries which are potential competitors as venues for foreign investment....It is up to each national government to develop the institutional, fiscal, and monetary policy climate so that the international investor responds to the given environment....Thus, the effective tax burden, as well as the overall economic policy and politico-institutional environment are all important determinants of foreign investment.”²²¹

While the paper did observe a then-recent trend of countries reforming their tax systems to remove tax incentives and broaden bases,²²² it also found that “[t]ax incentives are used in some form or other by most countries,” and advised that “developing countries hopeful of attracting foreign investment

²¹⁷ See, e.g., IMF, *supra* note 84, at 6-7 (noting international organizations “frequently advised [developing] countries to remove” tax incentives but to limited effect, perhaps because of “vested interests, political inertia, and tax competition” . . . and perhaps because “observers . . . underestimated the benefits that incentives have generated.”).

²¹⁸ See John Williamson, “The Strange History of the Washington Consensus,” *Journal of Post Keynesian Economics* 27, no. 2 (2004):195-206, 196 (reviewing ten Washington Consensus recommendations, including “Tax reform . . . so as to broaden the tax base and cut marginal rates.”).

²¹⁹ See, e.g., Alex Easson and Eric M. Zolt, *Tax Incentives* (World Bank Institute, 2002) at 1-2 (noting conventional wisdom that tax incentives are a bad idea, but also noting that most countries use them and that they can sometimes benefit countries).

²²⁰ IMF, *supra* note 212, at 3-4 (“The fiscal parameters (e.g., tax rates, exemption levels, rules for base determination) that characterize a given tax system can be expected to influence the international allocation of a given pool of foreign capital. . . . Its importance increases with the trend toward more freedom of movement for good and capital...”)

²²¹ IMF, *supra* note 212, at 29-30.

²²² *Id.* at iv.

should study carefully the ramifications of such tax incentives.”²²³ A 2011 report by the IMF, OECD and World Bank mirrored some of these observations more than two decades later, noting that “[s]triking the right balance between an attractive tax regime for domestic and foreign investment, by using tax incentives for example, and securing the necessary revenues for public spending, is a key policy dilemma.”²²⁴

In short, “conventional wisdoms,” internationalized discourses, advice, and practices have been an important influence on the tax and fiscal policies of developing countries for the last century, and the content of that advice has changed over time and continues to evolve.²²⁵ Against this backdrop, Pillar Two can be viewed as demanding that developing countries make new policy adjustments on top of existing policy choices already shaped by developed country agendas, conventional wisdom and advice from past eras, and further constrained by economic, political, and administrative realities. Understanding that Pillar Two is hardly the first time developing countries are being pressured to embrace or change policies prescribed by the developed world is crucial for interpreting their reactions to the reforms.

2. Pace at Which Concerns Come into Focus

As the BEPS project has unfolded, developing country concerns garnered attention more slowly than developed country ones. This was reflected in (1) the timing of developing countries’ involvement in the project, and (2) once involved, how long it has taken for their issues to gain serious traction.

On the first point, the Inclusive Framework was not formed (and hence developing countries not included) until ongoing pressures demanded it.²²⁶ Accordingly, the fundamental terms of the global tax reform agenda were set by developed countries. On the second, even after the Inclusive Framework’s creation, the drafting of Pillars One and Two initially omitted features critical

²²³ *Id.* at 26.

²²⁴ IMF, OECD, UN and World Bank, *supra* note 201 at 10. **Error! Hyperlink reference not valid.**The IMF and World Bank also influenced developing country tax policies through lending conditions imposed on countries. Stewart, *supra* note 208, at 154-61. The World Bank urged attention to tax incentives, and IMF lending conditionality advised developing countries to attract FDI. *Id.*, at 159-60. The IMF exerted influence on tax policy decisions through provision of technical and reform assistance through its Tax Policy Assessment Framework, and compelled tax reform through conditionality. *Id.* at 155-58.

²²⁵ See, e.g., UN, *Design and Assessment of Tax Incentives in Developing Countries: Selected Issues and A Country Experience* (2018), <https://www.un.org/esa/ffd/publications/design-and-assessment-of-tax-incentives-in-developing-countries.html> (describing efforts to establish “a theoretical framework and an empirical methodology to design and assess tax incentives, which could assist in identifying possible reforms aimed at improving their efficacy.”).

²²⁶ See sources cited *supra* note 22.

to developing countries' need to protect source taxation. For example, the QDMT was not introduced until *after* the initial October 2021 Agreement,²²⁷ itself the product of negotiations beginning in 2019.²²⁸ More recently, it took an unconscionably long time to appreciate that developing countries might be constrained in exercising taxing rights under Pillar Two (including through QDMTs) by previously signed BITs (often containing stabilization clauses).²²⁹ While all jurisdictions can sign BITs, in reality they primarily constrain developing countries.

It is now slowly becoming recognized that Pillar Two's focus on tax incentives leaves the possibility that countries may substitute nontax incentives (such as grants) for those barred by Pillar Two. Again, formally, all countries may implement nontax incentives, but they are likely out of reach for fiscally constrained developing countries. We are only just now seeing commentary that Pillar Two may need to expand its prohibitions to non-tax subsidies if countries circumvent it using nontax tools.²³⁰ Such an expansion would likely limit developed countries more than developing ones and would help bolster developing countries' ability to compete with developed countries for investment. But any such expansion would be a late-breaking development; Pillar Two's current design targets the tax competition feared by developed countries while leaving intact their ability to pursue their "renewed focus on industrial policy."²³¹

Why have these issues of concern to developing countries been slower to come to light and be reflected in substantive design features? This is likely tied to factors such as fewer domestic experts and advisors in developing countries (which creates challenges for responding quickly to proposals),²³²

²²⁷ Two-Pillar Statement, *supra* note 6.

²²⁸ OECD/G20 Base Erosion and Profit Shifting Project, *Tax Challenges Arising from Digitalisation—Report on Pillar Two Blueprint: Inclusive Framework on BEPS* (Oct. 14, 2020), at 3, <https://www.oecd-ilibrary.org/sites/abb4c3d1-en/#foreword-d1e20>.

²²⁹ See sources cited *supra* note 66; see also Mindy Herzfeld, "Could Bilateral Investment Treaties Kill Pillar Two?" *Tax Notes International* 110 (2023):1701-1705 (June 26, 2023) (detailing interplay between Pillar Two taxing rights—including QDMT—and developing countries' BITs); Blazej Kuzniacki, "Pillar Two and International Investment Agreements: 'QDMTT Payable' Seals An Internationally Wrongful Act," *Tax Notes International* 112 (2023):159-177.

²³⁰ Herzfeld, *supra* note 11. Some US observers have criticized Pillar Two's line drawing between inappropriate tax subsidies and other forms of aid, suggesting it favors state-directed economies like China. *Id.* See also Stephen A. Bonovich, "The Biggest Casualty of Pillar Two's Bias for State Subsidies? The U.S.," *Tax Notes International* 111 (2023):1529-44.

²³¹ See Herzfeld, *supra* note 11.

²³² See, e.g., Lyla Latif, "African Response to UNSG Report to Chart the Future of Taxation," *Tax Notes International* 111 (2023):1549-1552, 1550 ("The intricacies of international tax laws, combined with the brisk pace set by the OECD for reforms, make it exceedingly challenging for resource-constrained countries to meaningfully participate,

less international interest in developing country challenges, myopia on the part of tax professionals, less technical expertise among those who care about developing country issues, and language barriers.²³³

Regardless of whether it can be definitively proven that developing country interests are overall slower to be noticed, perceptions of pace and timing differences amplify developing country dissatisfaction. While developing countries may be more involved than before and while the reforms have been modified to account for their circumstances, there remain real and perceived disparities in pace and ordering of priorities.²³⁴

IV. ANALYZING THE DEBATES THROUGH THE “WIDE GULF” LENS

We now analyze the debates over OECD/G20-based global tax reform through the “wide gulf” lens. This reveals that while concerns about the gulf are a common thread running through developing country critiques, responses from developed-country perspectives have largely focused instead on Pillar Two’s benefits to developing countries over the short-term and on alleviation of tax competition *among* developing countries. Appreciating this fundamental divide renders coherent seemingly unconnected complaints, explains why developed country/OECD rejoinders may be unpersuasive, and illuminates the risks ahead for global tax reform.

A. *The Common Thread through Developing Country Complaints*

As Part II discussed, the numerous developing country criticisms have drawn counterarguments suggesting that they are incomplete, overstated, or inconsistent.²³⁵ There is also a tendency discount their intensity, given that

understand, and implement proposed changes.” (citations omitted)).

²³³ See, e.g., Benitez et al., *supra* note 202; Christensen, Hearson and Randriamanalina, *supra* note 100 at ¶3.2 (13-15); sources cited *supra* note 204.

²³⁴ See, e.g., OECD Webinar, “Economic Impact Assessment of the Two Pillar Solution: Revenue Estimate for Pillar One & Pillar Two, 18 January 2023, <https://web.archive.org/2023-01-18/649393-economic-impact-assessment-presentation-january-2023.pdf> (slide 7); Lamer, *supra* note 109, at 717 (quoting OECD Secretary-General: “[developing countries] have been a core and influential part of the inclusive framework,” “helped shape the . . . subject to tax rule, which will protect the right of developing countries to protect their tax base,” and “lead to the inclusion of key design features in the substance-based carveout and the domestic top tax”).

²³⁵ See *supra* Part II.B.; see also Lauren Vella, “OECD, Critics Spar Over Tax Deal’s Value for Developing Nations,” *BNA Daily Tax Report: International* (Aug. 25, 2023), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report-international/X5F3HAB000000?bna_news_filter=daily-tax-report-international#jcite (describing OECD “pushback” against developing countries’ administrability and tax rate concerns); Avi-Yonah & Kim, *supra* note 110 at 510 (asking whether developing countries’

developing countries have formally agreed to the reforms.²³⁶ We argue, however, that these complaints share an important, fundamental point: At core, they critique the ways in which the BEPS project has neglected the wide gulf between developing and developed countries and the important systematic differences that stem from it.

A central theme is that developing country tax regimes and policies, which have developed as a result of the wide gulf, are less compatible with Pillar Two than those of developed countries. So, for example, the concern that the 15% rate is too low reflects the reality of higher corporate tax rates and a greater reliance on corporate taxes in many developing countries as compared to OECD countries. As Part III.B showed, these features can be linked to the existence of an informal sector, difficulty of administering other tax bases, and other pressures (including pressures to tax capital income uniformly and to enact foreign tax credit-eligible taxes).²³⁷

Likewise, seemingly inconsistent developing country statements regarding Pillar Two's restrictions on tax incentives reflect the complicated place of tax incentives in developing countries' histories and the difficulties of evaluating them. On the one hand, incentives may have been viewed as necessary to attract FDI (particularly given high corporate tax rates and other constraints), but on the other hand there is a recognition that some incentives are ineffective, and that Pillar Two may represent a reform opportunity. Further complicating the picture, tax incentives were historically enacted under shifting advice and changing conventional wisdoms, which are now themselves shifting. Finally, there is a concern that developed countries will respond to Pillar Two by pursuing direct subsidies or infrastructure improvements, strategies which may be unrealistic for some developing countries. The perception that Pillar Two may leave untouched (at least initially) many incentives used by and available to developed countries leads to a conclusion that the burdens created by Pillar Two as a collective solution to a collective problem are not evenly shared.²³⁸ Here, again, developing

"tax holidays for FDI [are] the result of a careful cost/benefit . . . or . . . the result of pressure exerted by MNEs and the availability of other potential jurisdictions for investment" and suggesting that if "the latter, the critique is less convincing because the tax competition problem can be solved by the IIR and resident taxation").

²³⁶ Cf. Dagan, *supra* note 2 (discussing downsides of cooperation for developing countries); and Steven Dean, "Beyond the 'Made in American Tax Plan': GILTI and International Tax Cooperation's Next Golden Age," *Pittsburgh Tax Review* 18 (2021): 341-354, 345-48 (exploring interplay of cooperation, legitimacy, and coercive factors in international tax).

²³⁷ See sources cited *supra* note 151.

²³⁸ See, e.g., Herzfeld, *supra* note 11, at 331 (discussing advantages under Pillar 2 for countries that can offer certain kinds of incentives to MNEs, including incentives possible in state-managed economies); Victoria Perry, "Pillar 2, Tax Competition, and Low Income Sub-Saharan African Countries," *Intertax* 51 (2023):105-117, 110.

countries' positions are being articulated against the backdrop of a historically constituted world in which there are profound differences in resources and tax and economic structures.

Along similar lines, complaints about the inclusiveness of the process sound against the longer-term backdrop of the developing country exclusion and marginalization from global tax policymaking. A close look at some of the objections shows that the complaint is not just about actual physical attendance at the OECD negotiations and discussions but ongoing structural barriers that prevent effective participation and fair process. As Irma Mosquera Valderrama has noted, for example, these include language barriers, lack of technical knowledge and expertise to process and understand the reforms at speed, and lack of budget to travel to Paris (which is closer and more convenient for many OECD countries).²³⁹ These more fundamental barriers are the result of long-term inequities and processes, and they go beyond the mere fact of formal Inclusive Framework membership.

Another criticism spotlights nonparticipation in the Inclusive Framework by many low-income developing countries, and the problems that may accompany it.²⁴⁰ The wide gulf perspective illuminates how such nonparticipation is characteristic of the historic experience of low-income countries,²⁴¹ and is a result of longstanding dynamics and resulting barriers to participation.²⁴² As such, nonparticipation is not simply an isolated sovereign choice, but rather a historically constituted one.²⁴³

²³⁹ Mosquera Valderrama, *supra* note 204; *see also* Sarfo & Soong, *supra* note 112; Sarfo & Soong, *supra* note 204.

²⁴⁰ *See supra* Part I.B (Table 4 showing declining percentage of IF membership by income). For example, it is argued that the absence of many African countries from the project will lead to a lack of effective implementation in East Africa. *See* Latif, *supra* note 232 (discussing the historical patterns).

²⁴¹ *Id.* Okanga Okanga and Lyla Latif, "Effective Taxation in Africa: Confronting Systemic Vulnerability through Inclusive Global Tax Governance," *African Journal of International Economic Law* 2 (2021): 100-121, 103, <https://www.afronomicslaw.org/journal-file/effective-taxation-africa-confronting-systemic-vulnerability-through-inclusive-global> (discussing "how the historic absence of the African voice from the formulation of international tax norms contributed to the continent's abysmal tax performance"; noting that African countries "did not have a voice or vote when the rules of international taxation were first formalized vide the League of Nations a century ago, effectively embedding vulnerability into Africa's fiscal law and policy negotiations." (citation omitted).)

²⁴² *See* Latif, *supra* note 232 (linking historical patterns to Pillar Two). *See generally* Okgana & Latif, *supra* note **Error! Bookmark not defined.**; Didier Jacobs, "Is the Inclusive Framework Tax Deal in the Interest of Lower-Income Countries?" ICTD Blog (Feb. 28, 2022), <https://www.ictd.ac/blog/inclusive-framework-tax-deal-interests-lower-income-countries/>.

²⁴³ *See* Latif, *supra* note 232. *See, e.g.*, Julie McCarthy, "A Bad Deal for Development: Assessing the Impacts of the New Inclusive Framework Tax Deal on Low- and Middle-

In short, many objections from developing-country perspectives are not simply about specific rules or processes. Rather, they reflect an overarching critique that the BEPS project is not a unique moment in time, but is instead part of an ongoing story of economics, power, and political disparities playing out in the field of taxation. Today's global tax moment is embedded in long-term historical relationships, and countries' differential engagements in the process are neither a random feature nor an unusual experience, but rather a longstanding historical dynamic.

B. A Different Focus in the Responses and Defenses

Responses from developed country perspectives, including from OECD representatives themselves, tend to exhibit opposite characteristics: a focus on how developing countries will fare right after the reforms as compared to just before them (without contextualizing the current reforms amid longstanding world-system influences and pressures); a focus on how the current project improves the position of developing countries because they are the most dependent on corporate tax revenues and hence most vulnerable to MNE BEPS abuses (without a deeper account of how those vulnerabilities were created); and a focus on how the project helps developing countries vis á vis each other (while de-emphasizing the project's disproportionately larger gains to developed countries and burdens for developing countries).

IMF staff have identified as one of the benefits of Pillar Two the reduction in tax competition using ineffective tax incentives and the opportunity for developing countries "to re-design [these] incentives" and strengthen their ability to collect tax revenue.²⁴⁴ This sentiment is also expressed in the OECD's report on "Tax Incentives and the Global Minimum Corporate Tax", which examines how Pillar Two will impact tax incentives, particularly in developing countries.²⁴⁵ The report notes that "[i]n the past, jurisdictions have

Income Countries," *Brooking Global Working Paper* 174 (2022), 18, https://www.brookings.edu/wp-content/uploads/2022/05/Tax-and-Bad-Deal-for-Development_Final.pdf (noting most African and most of the least developing countries had not joined the IF; citing ATAF Executive Secretary's experience of tight deadlines for those who do join as risking "sign[ing] your taxing rights away in your sleep if you receive a deadline like this.")

²⁴⁴ Benitez et al., *supra* note 202 at 14 ("because it reduces the incentive for tax competition..., Pillar 2 should lead to a fundamental rethink of the design of CIT in LIDCs, with less pressure to cut the standard rate...and more innovative policies to reduce distortions through the tax base" (citations omitted)); *see also* IMF, "International Corporate Tax Reform," *IMF Policy Paper* No. 2023/001 (2023), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/02/06/International-Corporate-Tax-Reform-529240>.

²⁴⁵ OECD, *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives After the GLoBE Rules*, (2022) at 6, <https://www.oecd->

sought to attract investment through tax incentives, many of which have been found to be wasteful and ineffective, particularly in developing countries” and that “Pillar Two places multilaterally agreed limits on tax competition and will ease the pressures on jurisdictions to offer tax incentives.”²⁴⁶

A similar assessment is voiced by The International Institute for Sustainable Development (IISD), a think-tank based in Canada working on development issues.²⁴⁷ IISD concludes that “[t]he global minimum tax could also limit tax competition between developing countries in a range of economic sectors, such as mining, manufacturing, or telecommunications, reversing a decades-long ‘race to the bottom’ on corporate taxation,” which will help developing countries, which “in particular rely more heavily on corporate income tax revenue,” raise revenues.²⁴⁸ This perspective is echoed by individual commenters as well.²⁴⁹

But tax competition among developing countries is only part of the problem; the gap between developing and developed countries remains unaddressed. The extent to which Pillar Two would actually solve developing country tax revenue problems is questionable, due in part to what it fails to reform. Transfer pricing, for example, remains a serious issue even with Pillar Two in place. Effective enforcement of current transfer pricing rules requires a country to have significant tax capacity, which means the problem persists for lower-capacity developing countries.²⁵⁰ A simplified transfer pricing regime, akin to what is being drafted for Pillar One calculations, could streamline enforcement and aid developing countries with limited tax capacity.²⁵¹ Yet Pillar One has not kept pace with Pillar Two’s progress.

ilibrary.org/docserver/25d30b96-en.pdf?expires=1705021965&id=id&accname=ocid177459&checksum=46BAC229F3D509F98701D8CA8B8FD1F1.

²⁴⁶ *Id.* at 6; see also *id.* at 11 (referencing importance of tax incentives in developing countries “industrial and economic development strategy”).

²⁴⁷ IISD, “About Sustainable Development,” <https://www.iisd.org/mission-and-goals/sustainable-development> (last visited Feb. 15, 2024).

²⁴⁸ Thomas Lassourd, “What Does the Global Minimum Tax Deal Mean for Developing Countries,” *IISD Insight* (Feb. 10, 2022), <https://www.iisd.org/articles/global-minimum-tax-deal>.

²⁴⁹ See, e.g., Avi-Yonah, *supra* note 15, at 109 (“restricting the ability of developing countries to compete in granting tax incentives does not truly restrict their autonomy or counter their interests. That is the case whenever they grant the incentive only for fear of competition from other developing countries and would not have granted it but for such fear. Whenever competition from other countries drives the tax incentive, eliminating the competition does not hurt the developing country and may aid its revenue raising efforts (assuming it can attract investment on other grounds, which is typically the case).”

²⁵⁰ *Id.*

²⁵¹ *Id.*; see also, Eduardo Biastocchi, “The Transfer Pricing Problem: A Global Proposal for Simplification,” *Tax Lawyer* 59 (2006): 941-979, 955 (proposing transfer pricing simplification); Aitor Navarro, “Simplification in Transfer Pricing: A Plea for the Enactment

Moreover, Pillar Two's failure to address non-tax incentives and policies available to higher-capacity developed countries has potential to widen the already-wide gap.

Defenders of the BEPS project have likewise tended to emphasize the inclusivity and voice newly enjoyed by developing countries. Unsurprisingly, this has been the view of the OECD itself. In a report to the G20 Finance Ministers and Central Bank Governors, the OECD describes the second phase of the BEPS project as follows:

"In contrast to the development of the original BEPS package of 15 measures, developing countries have had a significant impact on the negotiation of these new rules.... Of even greater significance, the agreement marks the beginning of a new era of international co-operation which acknowledges the need for simpler approaches to the rules and standards. The agreement is the first serious multilateral step in a paradigm shift relating to the global income allocation system.... These recent developments may go some way to address the perception that the Inclusive Framework's agenda is not yet sufficiently balanced to reflect developing countries' interests."²⁵²

Tellingly, the OECD view seems to be that developing countries have had even more voice in, and impact on, the project's second phase than the first. Even if true, this misses the point of the objections.

Likewise, Pascal Saint-Amans, former director of the OECD Centre for Tax Policy and Administration, has pushed back against NGO complaints about lack of inclusion, saying "I really hate it when they say, 'Well, all this is meaningless because the developing countries are not on an equal footing' ... I'm sorry, it's not meaningless for developing countries! It's a breakthrough change for them."²⁵³ Saint-Amans has argued that Pillars One and Two would have looked very different without the input and participation of developing countries, and he has dismissed criticisms that the Inclusive Framework is not truly inclusive, stating that "[w]e have had a very inclusive process, and not only for implementation, but for standard setting," and that "this is a living body which can increase its membership," and that "[t]his criticism dies by itself, especially as we do respect that a number of other countries have other priorities."²⁵⁴

of Rebuttable Predetermined Margins and Methods within Developing Countries," *Florida Tax Review* 22 (2023): 755-788.

²⁵² OECD 2021 Inclusive Framework Report, *supra* note 60 at 4 (citing Christensen, Hearson, and Randriamanalina).

²⁵³ Stephanie Soong Johnston, "Pascal Saint-Amans—the Face of BEPS," *Tax Notes International* 76 (2014): 1051, 1053 (also describing the inclusion of non-OECD countries as a "massive change.").

²⁵⁴ Sarfo and Soong, *supra* note 204 at 1327 ("the two-pillar reform plan would have been very different if developing countries and emerging economies hadn't participated in

These types of statements emphasize the recent inclusion and participation gains enjoyed by developing countries, while deemphasizing wide, continuing historical disparities. Additionally, these statements emphasize formal increases in participation while talking less about on-the-ground barriers. Finally, these statements tend to view the involvement of the G20 nations as representative of a range of other jurisdictions not similarly situated and able to participate.²⁵⁵

The wide gulf between developed and developing countries, and the long history that has shaped it, may seem so obvious as to be unhelpful in elucidating the fractured global tax discourse. But this assumption is mistaken: the fact that the gulf is so ubiquitous as to have become part of the unnoticed fabric of countries' engagement instead of a conscious starting point for analysis is precisely the problem. Because of the deeply conflicting ways in which developing and developed countries evaluate and prioritize the gulf, countries don't just judge the BEPS project differently, but they often "talk past each other" in debating it.²⁵⁶

C. Gains from Cooperation and the Wide Gulf

Our analysis has to this point largely focused on interpreting how arguments of critics and defenders of global tax reform relate to the developing-developed country gulf. However, it is also useful to examine the analytical payoffs in economic terms. This can be done by comparing three possible outcomes of cooperation on tax revenues. To simplify, we initially focus on tax revenues and ignore other effects (such as FDI effects).

A first scenario is the case in which global tax cooperation generated no cooperative surplus—i.e., if less or the same amount of total global tax revenue were collected compared to the no-cooperation case—but merely redistributed tax revenues from some countries to others (for example, from developing to developed countries). If this were to happen, we would almost certainly expect developing countries to object to the deal. Here, the wide gulf analysis contributes little to an obvious conclusion.

A harder case arises if global tax cooperation generates an increase in total global tax revenue collected but some countries collect less revenue than before cooperation, while others collect more. It is plausible that the BEPS reform reflects this second scenario: Estimates show that global tax revenues

the negotiations on an equal footing, Saint-Amans said.”).

²⁵⁵ See, e.g., Soong Johnston, *supra* note 253.

²⁵⁶ See also Stephanie Soong, “Global Tax Plan Talks Don’t Breach Human Rights, OECD Says,” *Tax Notes International* 106 (2022):1311-1312 (discussing UN experts’ view that two-pillar solution is a step backwards for developing countries in human rights, and detailing OECD/Saint Amans’ response that it will limit tax competition).

collected are projected to increase, though some countries (such as small OFCs) may lose out. If it turned out that some developing countries are collecting less revenue than before despite an overall cooperative surplus, here again, some objections would not be surprising, especially if the decrease in tax revenues were also accompanied by less ability to attract FDI. In this scenario, as in the first, developing countries' objections would likely exist regardless the gulf and may be justified from the perspective of country-level national welfare.

Perhaps the most interesting scenario is the one in which all countries collect more tax revenues from cooperation but developed countries see a greater percentage increase than developing countries.²⁵⁷ It is here that we see the largest analytical payoff to the wide-gulf perspective: Now, all countries are better off than before cooperation. However, the wide-gulf perspective suggests that even here, some developing country voices might nonetheless object, on the theory that (1) the gulf between countries is a big problem, (2) the reform will not solve, and may even exacerbate, the problem, and (3) there is a significant opportunity cost, in the form of alternative reforms that may generate more revenue gains for developing countries than the BEPS solution (even though it may not generate overall cooperative surplus).

Developing country dissatisfaction under this third scenario may be the hardest for global tax reform's defenders to understand, in light of projected revenue gains and increased surplus. However, this would hardly be the first time a party receiving a smaller share of a cooperative surplus rejected it on inequality-aversion grounds, as demonstrated, for example, by empirical results of ultimatum games.²⁵⁸ Our point here is that some developing countries may not care about overall cooperative surplus if it doesn't fix the gap between countries, particularly in light of the administrative burdens and opportunity costs. Furthermore, what may seem like an improvement might actually not be one, if countries experience offsetting FDI losses.

V. INTERPRETIVE AND NORMATIVE IMPLICATIONS

Discerning the deep conflicts at the heart of global tax reform has important implications for accurately describing and understanding the actual

²⁵⁷ Or perhaps even the same percentage revenue increase.

²⁵⁸ See generally Werner Güth and Martin G. Kocher, "More than thirty years of ultimatum bargaining experiments: Motives, variations, and a survey of the recent literature," *Journal of Economic Behavior & Organization*, 108 (Dec. 2014):396-409, <https://doi.org/10.1016/j.jebo.2014.06.006>; Werner Güth, Rolf Schmittberger, and Bernd Schwarze, "An experimental analysis of ultimatum bargaining," *Journal of Economic Behavior & Organization*, 3, issue 4 (1982):367-88, [https://doi.org/10.1016/0167-2681\(82\)90011-7](https://doi.org/10.1016/0167-2681(82)90011-7).

state of global tax cooperation and for appreciating both its promise and its risks. It also offers broader insights for international relations and multilateral cooperation.

A. Normative and Interpretive Implications for the Global Tax Project

1. Developing Country Dissatisfaction and the UN Proposal

As Part II.A.6 describes, developing country dissatisfaction recently culminated in efforts to shift global tax negotiations to the UN. In August 2022, Nigeria put forward a resolution on behalf of the UN Africa Group, entitled “Promotion of Inclusive and Effective Tax Cooperation at the United Nations,”²⁵⁹ which was adopted by the UN General Assembly in December 2022.²⁶⁰ In August 2023, the UN issued a draft report proposing three options for making global tax cooperation truly inclusive through the UN.²⁶¹ The product of widespread public consultation, which drew over 80 submissions,²⁶² the report was finalized in September 2023.²⁶³ Based on the UN report, the Nigerian UN delegation submitted a new draft resolution in October 2023 on behalf of the Africa Group.²⁶⁴ That draft was revised,²⁶⁵ approved in committee on November 22, 2023,²⁶⁶ and adopted by the UN

²⁵⁹ UN General Assembly, “Resolution adopted by the General Assembly on 30 December 2022,” A/RES/77/244, <https://financing.desa.un.org/sites/default/files/2023-04/A%20RES%2077-244%20English.pdf>; Norwegian Agency for Development Cooperation, “Questions & Answers On the United Nations and International Tax Cooperation: UN General Assembly Resolutions and the proposal for a UN Convention on Tax (Nov. 7, 2023),” https://assets.nationbuilder.com/eurodad/pages/3207/attachments/original/1699364566/QA_7_November_2023.pdf?1699364566.

²⁶⁰ U.N. General Assembly Resolution, *supra* note 259.

²⁶¹ Sarah Paez, “U.N. Proposes Options for Inclusive Global Tax Negotiations,” *Tax Notes International* 111 (2023): 874-875.

²⁶² U.N. Dep’t of Econ. & Soc. Affairs, *Promotion of inclusive and effective tax cooperation at the United Nations*, INPUTS TAX REPORT 2023 <https://financing.desa.un.org/document/promotion-inclusive-and-effective-international-tax-cooperation-united-nations-a78235>; Norwegian Questions & Answers, *supra* note 259 at 6.

²⁶³ See sources cited *supra* note 262.

²⁶⁴ *Id.*; Robin, *supra* note 106.

²⁶⁵ U.N. General Assembly, Nigeria: revised draft resolution “Promotion of inclusive and effective international tax cooperation at the United Nations,” (Nov. 15, 2023), A/C.2/78/L.18/Rev.1, <https://digitallibrary.un.org/record/4027784?ln=en>.

²⁶⁶ Sarah Paez, *U.N. Tax Cooperation Resolution Passes in Committee Vote*, *Tax Notes Int’l* 112:1444 (Dec. 4, 2023); Global Alliance for Tax Justice, Press release: *Governments Approve Proposal for International Tax Cooperation at the United Nations*, (Nov. 23, 2022), <https://globaltaxjustice.org/news/press-release-governments-approve-proposal-for-international-tax-cooperation-at-united-nations/>.

General Assembly on December 22, 2023.²⁶⁷ The resolution “calls for the establishment of a member-state-led...committee to develop and finalize a comprehensive convention on international tax cooperation,” with such convention being legally binding.²⁶⁸ On June 7, 2024, the UN Ad Hoc released a “zero draft” of proposed terms of reference to be included in a UN framework convention, which envisions that the framework convention will be negotiated alongside five “early protocols” “in accordance with established practice” in 2025 and 2026.²⁶⁹

Notably, the December 2023 UN resolution went through successfully despite the opposition of the United Kingdom, United States, EU, and other developed/OECD countries, and their attempts to amend the resolution to make the convention nonbinding.²⁷⁰ The fact that the UN movement gained traction and passed—despite the opposition of powerful OECD countries—at the very moment that Pillar Two was poised to deliver tax revenues gains to many jurisdictions (including developing countries) is somewhat surprising.

Our view is that the success of the UN move is not actually that surprising once one focuses on the deeper developing country critique concerning the historic between-country gulf and the BEPS project’s failure to address that gulf. As Part III.A described, the core politics of the BEPS project centered on the intra-country concerns of the developed world. By assessing the project’s progress through primarily an inter-developing country competition paradigm and through a short-term economic window reflecting year-over-year tax revenue gains, the developed world saw success where developing countries saw little real movement on key issues they viewed as important.

2. Probing the Thinking Behind the Proposed UN Move

What do developing countries hope to gain by shifting global tax reform to the UN? Countries advocating for the UN move may have decided that any

²⁶⁷ Sarah Paez, “U.N. General Assembly Adopts International Tax Cooperation Resolution,” *Tax Notes Today International* (2023):246-6.

²⁶⁸ *Id.*

²⁶⁹ United Nation, Bureau’s Proposal for the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation, June 7, 2024, <https://financing.desa.un.org/sites/default/files/2024-06/Zero%20draft%20ToR%207%20June%202024.pdf>.

²⁷⁰ See Paez, *supra* note 266 (describing US, UK, and EU member states’ opposition); Robin, *supra* note 106; Elodie Lamer, NGOs “Criticize EU’s Reluctance to Join a U.N. Tax Convention” *Tax Notes International* 112 (2023): 704-705; Derren Chan, “UN Moves to Draft New Convention on International Tax Cooperation,” *Jurist* (Nov. 23, 2023), <https://www.jurist.org/news/2023/11/un-moves-to-draft-new-convention-on-international-tax-cooperation/>.

incremental increase in tax revenue from Pillar Two is insufficient reason to support the OECD Inclusive Framework as the exclusive tax reform platform. The significant burdens that Pillar Two has required of developing countries to secure slightly more tax revenue may look like a poor investment, particularly when viewed next to the proportionally greater gains anticipated by developed countries and the continuing developing-developed country gulf.

Furthermore, some developing countries might believe that, to the extent the two-pillar project is delivering positives for them, those positives were not easy to secure, as evidenced by the challenges and delays in obtaining incremental modifications to Pillar Two. Moreover, Pillar One, which in theory could benefit some (but perhaps fewer than touted) developing countries through new allocations of existing tax revenue and the simplification of some transfer pricing, has moved slowly.²⁷¹ Thus, countries may feel that continued participation in OECD work will confront similar hurdles.

More broadly, developing countries may have concluded that even if pursued to the maximum, OECD-based reform will never deliver the transformational gap-closing they seek, in part because that was never the project's founding focus, and in part because the OECD and developed world have yet to recognize the significance of the wide gulf. Thus, we are now seeing a rejection of both the substantive focus of the OECD's work and the venue in which it is being crafted. Developing countries may believe that they can secure an increase in their slice of tax revenue compared to developed countries through other tax reforms, ones targeting the framework of international tax (such as formulary apportionment, revision of permanent establishment definitions, and reconsideration of source rules). And they may believe that the UN is the venue more likely to advance these priorities.²⁷² Paradoxically, it is quite possible that the collective global movement on OECD-based global tax reform, though ultimately viewed as insufficient, may have inspired developing countries to imagine that fundamental reform is possible...somewhere else.

An often-heard objection to the UN move is that the OECD has more capacity and infrastructure, the UN is ill-equipped to lead global tax reform, and any project spearheaded under UN auspices will surely stall or fail.

²⁷¹ See, e.g., Robert Goulder, "Expectations for 2024: Pillar 1 Finds an Off-Ramp," *Tax Notes International* 112 (2023):1819-1822; OECD/G20 Base Erosion and Profit Shifting Project, *Update to Pillar One timeline by the OECD/G20 Inclusive Framework on BEPS*, (Dec. 18, 2023), <https://www.oecd.org/tax/beps/update-pillar-one-timeline-beps-inclusive-framework-december-2023.pdf>.

²⁷² See, e.g., Assaf Harpaz, "International Tax Reform Who Gets a Seat at the Table?" *University of Pennsylvania Journal of International Law* 44 (2023):1007-1064, 1057-1058 (viewing UN as a more favorable venue for developing countries).

Nonetheless, some developing countries may be advocating for a move to the UN because there is a sense that (1) OECD-led reform thus far has sapped the time, resources, energy, and attention of the world with insufficient benefits to developing countries; (2) there have been opportunity costs in the form of missed chances for alternative and more beneficial reforms; (3) future OECD-reform is no more likely to benefit developing countries or close the developing-developed country gap, and/or (4) moving to the UN, even if unproductive, inefficient, or ill-fated, will at least eliminate that opportunity cost. On the more positive side, there remains a sense that UN-led reform will provide a better forum for addressing taxation and development issues jointly, yielding approaches and solutions better targeted at the developing-developed country gulf.

Finally, it is worth noting that by advocating for a new role for the UN in tax policymaking, developing countries have not foresworn participation in Pillar Two. Inclusive Framework's work on Pillar Two will continue as the regime comes into force in many jurisdictions in 2024 and 2025. The outcome of Pillar One may be less clear in a world in which the UN plays a more active tax role, but Pillar One's path forward is less certain regardless.

Whether the UN will ultimately produce the kinds of global tax reforms and changes that developing countries seek is by no means guaranteed, and the timetable may be long. But the decision to try, and to try through the UN, is not unexpected nor even unreasonable, in light of the developing-developed country gulf.

3. The Limits of OECD-Based Global Tax Reform

Would the current global tax situation look different today if developed countries and the OECD had more fully understood the depth, nature, and context of developing country objections? It is hard to say. We can identify a number of decisions that the OECD could have done differently to address developing country concerns—some with little pushback from developed countries, others likely improbable.

Some developing country concerns could be relatively easily accommodated by providing more resource support (travel financing, more convenient meeting locations, and more accessible meeting formats), adapting the pace of the project to allow countries more time to evaluate proposals, better anticipating certain design objections in advance (e.g., issues with Pillar Two's pre-QDMT design), and better foreseeing implementation challenges (e.g., anticipating Pillar Two's interplay with investment treaties).

At the other extreme, the fundamental goals of Pillars One and Two would likely have been hard to modify. The work on the two pillars was never

about a wholesale redesign of the international tax regime nor about developing country reform priorities (such as shifting to formulary apportionment in transfer pricing, revisiting the permanent establishment concept, and expanding source-based taxation beyond Pillar One). In fact, attending to these developing country reform priorities would probably have required the OECD to pause the two-pillar project. Between the extremes lie areas where the OECD could have explored measures more responsive to developing countries, but at some cost. These might include revisiting thresholds for in-scope entities and the minimum tax rate, both of which might have significant distributional impacts.

As we move from relatively easy accommodations to the kinds of deeper changes likely to help close the gap, serious reallocations of tax revenue, investment flows, and ultimately global income and wealth would be required. But those are the very reallocations that are probably least likely to occur under OECD auspices, given the BEPS project's core mission. It is also entirely possible that the historical baggage the OECD brings to the table would have been too significant to surmount, and that developing countries would have sought alternative venues regardless.

Are significant reallocations likely to occur if the UN becomes the venue for global tax work? As we next discuss, we have doubts, not necessarily because of the UN but because of the ultimate limitations of tackling the wide developing-developed country gulf through tax reform as opposed to more fundamental change.

4. The Outer Limits of Global Tax Reform

What is the path forward for global tax reform? There are a range of possibilities, though little certainty.

One possibility is that the locus of global tax reform work will stay with the OECD. If the BEPS Inclusive Framework produces serious movement on Pillar One, that might keep developing countries engaged. But the pace of progress, coupled with substantive adjustments to Pillar One, would need to be dramatic enough for the OECD path to remain preferable to either unilateral digital services taxes or to any alternative the UN might craft relatively soon. Even if the OECD work were to continue, however, developing countries' deeper frustrations and objections are likely to remain.

Yet, a shift to the UN alone is unlikely to provide a quick solution for at least three reasons. First, the UN would need to ramp up its tax function and resources. This will take significant time and effort and might not ultimately happen. As discussed above, however, the UN move might be viewed as a way to avoid the opportunity costs of further OECD-based action, even

absent positive deliverables. Second, power dynamics in tax policy will continue to be significant. Any tax reform likely to help developing countries narrow the wide gulf will need buy-in from at least some developed countries, such as the US and the EU. Simply moving the project to the UN will not solve those underlying dynamics.²⁷³

Third and most crucially, there are outer limits to what tax reform, even if bold, can achieve. Tax policy reforms are about the allocation of future tax revenue and capital flows among states. Thus, the product of reforms would be limited by the size of revenue and capital flows, and countries' willingness to share them. But the historic gulf we have documented is not just the product of tax or even investment policy, and it is not reflected just in tax capacity but in many other economic, social, and institutional measures. Moreover, inequality between countries was not formed in a matter of decades but centuries. If developing countries really want to attend to that gulf, they will need to look beyond the tax system. A well-designed tax regime can be an important tool for nations, but its role is limited.

How likely is it that we will see significant tax reforms, even acknowledging its outer limitations? One possible way in which developing countries might obtain leverage to get developed countries on board and advance their tax reform interests (whether under OECD or UN auspices) might be if they are willing to make concessions on non-tax issues of high priority to developed countries, for example, on geopolitical security alignments or on trade. Power and negotiation dynamics would have to shift for this to happen, and action in the near future seems unlikely. However, developing country efforts to re-center the global tax conversation may initiate a wider shift in attention to their larger goals.

B. Broader Non-Tax Implications

What can our analysis of the conflict in the OECD/G20 global tax project tell us about such cooperation beyond the tax arena? ²⁷⁴ First, assertions of cooperation, particularly on a global scale, are likely to disguise serious power dynamics and elements of coercion. This will likely be true even when the problem being confronted is one for which there may be a high degree of shared recognition. Second, it matters how we describe global endeavors. The more strongly we hold to a frame of shared interests and cooperation, the

²⁷³ See, e.g., Martin Hearson, *Imposing Standards* (Ithaca: Cornell University Press, 2021) 155 (concluding the "global power shift that is currently under way is not enough to change the North-South politics of global tax governance, at least not overnight.").

²⁷⁴ For example, exploring the implications of this tax story for broader literatures in international law, e.g. James Thuo Gathii, "The Promise of International Law: A Third World View" *American University International Law Review* 36 (2021):377-477.

more we obscure the role of power and the underlying fractures. This limits our ability to respond to them. Sufficiently ignored during the course of the global cooperation process, these forces may ultimately break through and prove capable of seriously disrupting any cooperative endeavor. Yet, the cooperation stories we tell ourselves can persist until the power balance shifts in some way, for example, through outside events, realigned interests, or changing actors. These dynamics in the global tax deal, captured by the concept of the wide gulf articulated above and proposed shift to the UN, illustrate familiar facets of international relations theory, including the persistent relevance of power and coercion in global affairs (neorealism), even when tempered by value-creating dealmaking (liberalism) and cognitive forces (such as the impact of epistemic communities).

CONCLUSION

By revealing the crux of the deep fissure between how developing and developed countries view the OECD/G20 global tax reform, this Article calls into question the cooperation-centric account of the global tax project that has dominated tax policy circles since the project's inception. No conceptual frame fully captures all actors, positions, views, and statements. Furthermore, there are serious questions surrounding who legitimately speaks for whom. But even with those caveats, focusing on the wide developing-developed country gulf is a useful analytical heuristic for deciphering the conflictual dynamics underlying today's seemingly cooperative global tax reform.

Appendix

Table A.5. Low-Income and Lower-Middle Income Economies (per World Bank classification) that are NOT BEPS Inclusive Framework Members		
Low-Income Economies	Lower-Middle Income Economies	
Afghanistan	<u>Algeria</u>	Tanzania
Burundi	<u>Bangladesh</u>	Tajikistan
Central African Republic	<u>Bhutan</u>	Timor-Leste
Chad	<u>Bolivia</u>	Vanuatu
Eritrea	<u>Cambodia</u>	Zimbabwe
Ethiopia	<u>Comoros</u>	
Gambia, The	<u>Ghana</u>	
Guinea-Bissau	<u>Guinea</u>	
Korea, Dem. People's Rep.	<u>Iran, Islamic Rep.</u>	
Madagascar	<u>Kiribati</u>	
Malawi	<u>Kyrgyz Republic</u>	
Mali	<u>Lao PDR</u>	
Mozambique	<u>Lebanon</u>	
Niger	<u>Lesotho</u>	
Rwanda	<u>Micronesia, Fed. St.</u>	
Somalia	<u>Myanmar</u>	
South Sudan	<u>Nepal</u>	
Sudan	<u>Nicaragua</u>	
Syrian Arab Republic	<u>São Tomé and Príncipe</u>	
Uganda	<u>Solomon Islands</u>	
Yemen, Rep.		

Table A.6. Upper-Middle- and High-Income Economies (per World Bank classification) that are NOT BEPS Inclusive Framework Members	
Upper-Middle Income Economies	High-Income Economies¹
Cuba	Cyprus
El Salvador	French Polynesia
Equatorial Guinea	Guyana
Ecuador	Nauru
Fiji	New Caledonia
<u>Guatemala</u>	Northern Mariana Islands
Iraq	Sint Maarten (Dutch Part)
Kosovo	Saint Martin (French Part)
Libya	Taiwan
Marshall Islands	
Palau	
Suriname	
Tonga	
Turkmenistan	
Tuvalu	
West Bank and Gaza	