A Global Minimum Corporate Tax and its Impact on Corporations and the Global Economy

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I. INTRODUCTION

At the 2021 G20 summit in Rome all twenty countries formally endorsed a plan drafted by the Organization for Economic Cooperation and Development (OECD).[1] The plan is an international tax agreement designed to decrease the existence and usage of low tax jurisdictions (LTJs) and increase the amount of tax revenue collected by governments worldwide.[2] It consists of two pillars that are model rules governments should put in place to ensure multinational entities

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[1] Jan Strupczewski et. al., *G20 Leaders Endorse Global Minimum Corporate Tax Deal for 2023 Start*, REUTERS (Oct. 30, 2021), https://www.reuters.com/business/g20-leaders-endorse-global-minimum-corporate-tax-deal-2023-start-2021-10-30/#:~:text=ROME%2C%20Oct%2030%20(Reuters),rules%20in%20force%20in%202023.

[2] *International Community Strikes a Groundbreaking Tax Deal for the Digital Age*, OECD (Aug. 10, 2021), https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm.

(MNEs) are not lowering their tax bill through the use of subsidiaries in low tax jurisdictions. The plan, if widely implemented, could produce more tax revenue for governments; however, this will not be without drawbacks. It will also cause an increase in the price of international investment into developing economies, increase the cost of doing business and slow global economic growth.[3] Overall, this will make it harder for developing economies to advance and create worse individual outcomes in the home country of the MNE and countries in need of investment.[4]

II. A LONG HISTORY OF LTJS

Modern day LTJs have their roots in the late 19th century, however the idea of minimizing taxation incurred through commerce is as old as commerce itself. There are accounts of Greek and Roman citizens hiding their assets from authorities in an attempt to avoid taxation.[5] Similarly, medieval lenders attempted to cover up their stream of revenue from the ruling religious figures of the time who collected taxes.[6] In essence, tax evasion as an idea has been around as long as taxes themselves.

The development of modern-day LTJs began in the United States (U.S.) in the late 19th century.[7] At this point in time, industrialization began to create large for-profit corporations.[8] New York and Massachusetts had the highest concentration of corporate structures within their borders.[9] The tax revenue produced by corporations within those states was excessively large compared to neighboring states, and New Jersey took notice.[10] Reacting to this, New Jersey partnered with a corporate lawyer from New York named James Dill and adopted an extremely loose corporate law.[11] The state had Dill draft multiple acts that expanded the freedom and ability of corporations to acquire other companies, lessened or abolished any regulation on corporation size or market share, and gave corporations the ability to own equity in other companies.[12] While the New Jersey act did little to address tax systems; it eventually led to LTJs by creating a model where states let corporations write their corporate law.[13] Delaware the most popular modern day domestic state of incorporation

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[3] Qing Hong and Michael Smart, *In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment*, 54 EUROPEAN ECON. REV. 82 (2010).

[4] *Id.*; *See also infra* pp. 44–46 and note 220.

[5] RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALIZATION REALLY WORKS, 107 (2010).

[6] *Id.*

[7] *Id.* at 109.

[8] *Id.* at 109-10.

[9] *Id.* at 110.

[10] *Id*. at 110.

[11] PALAN*, supra* note 5, at 110.

[12] PALAN*, supra* note 5, at 110

[13] *Id.* James Dill was a corporate lawyer.

within the U.S. was next to follow.[14] Eastern states enacting relaxed corporate laws and tax structures kicked off a race to the bottom in the early twentieth century. States restructured their laws to be favorable to corporations in an effort to gain outside capital investment.[15]

While this model of gaining capital investment through creating a favorable legal system originated in the U.S., it quickly spread to other areas of the world. In Switzerland, the same competition developed when in the 1920s, the Canton of Zug adopted similar practices to the aforementioned U.S. states to attract more investment to their impoverished Canton.[16] Contrary to the U.S. states that started the trend, the Canton of Zug's strategy was directly linked to taxation. In the 1920s, two of the largest entities in Zug threatened to leave the canton if they were not refunded some of their taxes.[17] The government yielded to the entities noting that it would have been far more expensive for them if the corporations left, than to give them their tax rebates.[18]

While the idea of creating a favorable legal structure to attract corporations to your jurisdiction was an invention of the U.S., the ability to be incorporated in a different location than where a business operates was created by British courts.[19]

The Egyptian Land and Investment Co. was a British Company created to invest in Egyptian Real Estate.[20] While incorporated in London, the business' operations were in Egypt and its board members lived in Cairo.[21] The only thing they had in London was a small office staffed with a clerk that gave them an address in England.[22] The English tax authority attempted to collect taxes from the company on money they had made through their operations in Egypt.[23] The company refused and litigation ensued.[24] On appeal, the House of Lords decided a company's place of registration and a company's residence were two completely different things and according to the tax code the company's residence was the important factor for income taxation purposes.[25] Because all of their business was done in Cairo and their entire board resided there, the court ruled that the Egyptian Delta Land and Investment Co. resided in Egypt and was not subject

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[14] In 2021, 66.8% of S&P 500 companies were incorporated in Delaware and 93% of all U.S. IPOs were from Delaware corporations. *Annual Report Statistics,* DELAWARE.GOV (last visited Oct. 10,2022), https://corp.delaware.gov/stats/.

[15] PALAN, *supra* note 5, at 110–11.

[16] PALAN, *supra* note 5, at 111.

[17] PALAN, *supra* note 5, at 111.

[18] PALAN, *supra* note 5, at 111.

[19] PALAN, *supra* note 5, at 112.

[20] PALAN, *supra* note 5, at 113.

[21] Todd v. The Egyptian Delta Land and Inv. Co. [1929] AC 1 (HL) (appeal taken from Eng.).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

to income taxation in England.[26] While the House of Lords was trying to interpret its tax code, it gave companies the ability to incorporate themselves in the U.K. but not be subject to the U.K. tax code if they resided in another country.

On its face, this decision does not seem problematic. After all, the problem that the OECD was trying to fix with their new international tax agreement was to ensure taxes were being paid in the countries where the revenue was being generated.[27] The House of Lords believed their ruling implied that because Egyptian Delta's business was done in Egypt, they should pay taxes in Egypt.[28] However, this decision created the possibility for "virtual residency" or the practice of being incorporated in a different location than where a business resides.[29] The important tax implication of this case is not the fact that the companies were not subject to taxes in the country they were incorporated in. Rather, it was that the court allowed companies to "reside" in a different place than they had incorporated in. This gave corporations two separate presences despite the common law practice of treating corporations like natural persons.

The modern model of LTJs began to form in the 1930s and 40s starting with Switzerland.[30] As aforementioned, Swiss Cantons were using the U.S. model of restricting laws to gain domestic capital within their territories.[31] In the 1930s and 40s, Switzerland used the same method to attract international businesses by changing their bank secrecy laws.[32] In essence, the combined legislative actions created a place with extremely low taxes while simultaneously ensuring confidentiality about the origin and existence of assets held within Swiss accounts.[33]

For a variety of reasons, during the same time period, many British Colonies, specifically islands in the Caribbean, began cementing their effectiveness as LTJs for large U.S. companies.[34] These countries developed as LTJs precisely because they were under British rule.[35] At the time, the British Empire was the largest empire the world had ever seen, making them an economic leader of the world.[36] Furthermore, British colonies had societies that were dominated and ruled by the elite class who would have a motive to get around taxation and

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[26] *Id.*

[27] OECD, *Tax Challenges Arising from the Digitalization of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS* (Dec. 14, 2021), https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-base-erosion-model-rules-pillar-two.htm.

[28] Todd, *supra* note 21.

[29] PALAN, *supra* note 5, at 112–15.

[30] PALAN, *supra* note 5, at 115–119.

[31] PALAN, *supra* note 5, at 120.

[32] PALAN, *supra* note 5, at 120.

[33] PALAN, *supra* note 5, at 115.

[34] PALAN, *supra* note 5, at 126–130.

[35] PALAN, *supra* note 5, at 126–130.

[36] PALAN, *supra* note 5, at 124.

regulation.[37] Lastly, the fact that all these colonies adopted the British System of common law made it easier for creative tax lawyers to seek out legal ambiguities through litigation.[38] The small British controlled islands of the Caribbean went through a continual cycle of foreign investment and tax code changes until being LTJs became the dominant industry by the 1970s.[39]

Not only did these islands and their liberally construed corporate laws have relaxed corporate tax policies, but they also contributed to the growth of illicit markets.[40] Meyer Lansky, who was infamously known as "the mafia's accountant," was one of the first people in the U.S. to begin developing and using offshore accounts in what would eventually become low tax countries.[41] He used them strictly for the purpose of laundering illegally obtained profits.[42] It was not long after that corporations within the U.S. began to learn that they could use the same offshore financial institutions to decrease tax liabilities within the U.S.[43]

The relationship between illicit businessmen and legal corporate businessmen in the U.S. may have been closer than many people think. There were around a dozen businessmen in the 1950s, some like Lansky, with connections to organized crime, who were dubbed the "Bay Street Boys."[44] The Bay Street Boys took control of the Bahamian government through bribery, and within ten years, they developed the island into a bustling tourist attraction for wealthy Americans.[45] Things that at the time were illegal in America, such as gambling, were completely legal in the Bahamas.[46] The Bay Street Boys got to write the laws of the islands and simultaneously buy and develop the prime real estate.[47] Eventually, the Bahamian people grew tired of the island being spoiled by American businessmen setting up shady touristic business on the island and elected an official whose platform was to go against the trend.[48] While they successfully got rid of the less desirable businesses, the laws making it illegal for banks to release account information to investigators in the U.S and the low

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[37] PALAN, *supra* note 5, at 124.

[38] PALAN, *supra* note 5, at 124.

[39] CHARLES A. DAINOFF, OUTLAW PARADISE; WHY COUNTRIES BECOME TAX HAVENS xi-xv (2021).

[40] *Id.* at xi.

[41] *Id.* at xi-xv.

[42] *Id.*

[43] PALAN, *supra* note 5, at 128.

[44] PALAN, *supra* note 5, at 127–28.

[45] PALAN, *supra* note 5, at 128.

[46] DAINOFF, *supra* note 39, at xii.

[47] DAINOFF, *supra* note 39, at xii

[48] Many of the businesses set up were of the kind that were illegal in the United States at the time so wealthier Americans could escape the regulations of their country and enjoy their illegal vices. This was put to an end when the first black prime minister of the Bahamas was elected, Sir Lynden Pindling. He ran on a platform of ending gambling, corruption, and the white minority rule of the island. *See* Palan, *supra* note 5, at 127–28; *see also* DAINOFF, *supra* note 39, at xii.

corporate tax rate stayed.[49] This exact cycle happened in many other Islands similar in size, location, and population to the Bahamas.[50]

The last important factor to bridge the gap between the late 20th century and LTJs in the modern day is the exponential growth of technology, which has given rise to a globalized economy.[51] There are arguably two types of financial institutions and transactions: retail finance and wholesale finance.[52] *Retail finance* is what laypersons think of when they think of finance. It is the highly profitable industry of saving and borrowing that is open to individual consumers.[53] *Wholesale finance,* on the other hand, is bulk financial transactions between financial institutions all over the world on a daily basis.[54] The important branch of the financial sector to be able to understand LTJs is wholesale finance.[55]

Wholesale finance has been largely a global matter since the end of World War II.[56] Global financial institutions trade incorporeal assets.[57] These are assets that institutions or individuals have control and ownership over that are not tangible.[58] In other words, they cannot be seen or touched.[59] The Bank for International Settlements estimates that there are over 600 trillion dollars' worth of outstanding derivative contracts.[60] In simple terms, a derivative contract allows someone to trade the value of something without trading the physical asset.[61] Because incorporeal assets are highly mobile and not attached to real property in a specific jurisdiction, a financial institution can have a large group of professionals making transactions in a major business hub such as New York City, London, or Paris but book the transaction in their bank branch that exists in an LTJ such as Switzerland or The Cayman Islands.[62] This is the most

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[49] DAINOFF, *supra* note 39, at xii.

[50] DAINOFF, *supra* note 39, at xiii.

[51] PALAN, *supra* note 5, at 18.

[52] PALAN, *supra* note 5, at 19–21.

[53] PALAN, *supra* note 5, at 19–21.

[54] PALAN, *supra* note 5, at 19–21.

[55] PALAN, *supra* note 5, at 19–21.

[56] PALAN, *supra* note 5, at 19–21.

[57] PALAN, *supra* note 5, at 19-21.

[58] PALAN, *supra* note 5, at 19–21.

[59] PALAN, *supra* note 5, at 19–21.

[60] PALAN, *supra* note 5, at 19–21; A derivative contract is a contract of which the value is tied to an underlying asset or benchmark or market factor. *Derivatives*, OFF. OF THE COMPTROLLER OF THE CURRENCY https://www.occ.treas.gov/topics/supervision-and-examination/capital-markets/financial-markets/derivatives/index-derivatives.html#:~:text=A%20derivative%20is%20a%20financial,%2C%20credit%2C%20and%20equity%20prices ((last visited Feb. 27, 2023).

[61] Derivatives, *supra* note 60.

[62] Oftentimes these branches do not even have a physical location but rather the branch just exists on paper.

basic and simple overview of how an LTJ works for institutions that profit from financial transactions.

Large corporations or MNEs can use LTJs in a similar fashion. They operate through a complex set of subsidiaries and subcontractors to be able to book their transactions in popular low tax countries.[63] Legally, MNEs can maintain ties with their subsidiaries; however, all subsidiaries are treated as completely individual entities.[64] As companies commence international business, countries have the option between taxing the companies where they make that profit or taxing the companies in the country where they reside.[65] The residency principle is the most commonly used method around the world which has serious implications for LTJs.[66] If LTJs offer corporations the opportunity to establish a subsidiary in that country and simultaneously have laws restricting the dispersal of information about where the company's money came from, one can see how easy it would be for a company to shift profits to their subsidiaries to mitigate taxation. Low tax jurisdictions and corporations capitalized on this opportunity and now have a complicated network of different financial vehicles, accounts, and subsidiaries to lower their tax burden.[67]

Once someone understands a very baseline model of how LTJs work, the next overarching question is "Why do LTJs offer this service?" Oftentimes, LTJs get a less than stellar international reputation amongst high tax countries.[68] When a country gains a reputation as being an LTJ, they get a good reputation in the business and finance industries of the world but become a renegade state in the eyes of the political and diplomatic communities of the world.[69] While this could come with some weighty consequences in the form of sanctions, for a lot of LTJs, the benefits outweigh the negatives. The main benefit of becoming an LTJ is attracting and retaining foreign capital.[70] Relative to the majority of countries that are similarly sized, LTJs are better off.[71] According to the World Bank Data in 2015, foreign direct investment (FDI) inflows to LTJs was on average $190 billion (USD) per country.[72] Similarly sized high tax countries had an average of $549 million in the year 2015.[73]

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[63] DAINOFF, *supra* note 39, at 6–7.

[64] DAINOFF, *supra* note 39, at 6–7.

[65] PALAN, *supra* note 5, at 80.

[66] PALAN, *supra* note 5, at 80.

[67] PALAN, *supra* note 5, at 80–94.

[68] *See generally* Michiel van Dijk & Francis Weyzig, *The Global Problem of Tax Havens: The Case of the Netherlands*, SOMO PAPER, http://www.bibalex.org/search4dev/files/300003/129157.pdf (last visited Jan. 30, 2024).

[69] DAINOFF, *supra* note 39, at 16 ("A renegade state is generally regarded as a state whose "practices are salient to an international regime but whose behavior does not comply with the descriptive norms or practices of that regime.").

[70] DAINOFF, *supra* note 39, at 13.

[71] DAINOFF, *supra* note 39, at 13.

[72] DAINOFF, *supra* note 39, at 13.

[73] Similarly sized refers to population size of around 4 million. DAINOFF, *supra* note 39, at 13–14.

Becoming an LTJ is an effective strategy to develop a country's economy. This strategy is attractive for many reasons. First not all countries, especially those with small geographic territories, have the opportunity to develop other industries like natural resources extraction.[74] Similarly, if they do possess vast natural resources, developing tax code to become an LTJ requires a lower startup cost and consequently preserves those natural resources for later extraction.[75] Furthermore, from a political standpoint, changing the corporate tax scheme to be favorable to FDI forces very little, if any, change in the day-to-day lives of the country's citizens. This was evident when the Bahamas could continue being an LTJ after they kicked out all the morally or legally questionable businesses from the original foreign investment into the tourism industry.[76]

A country favoring corporations in their tax law is a transaction between MNEs and the sovereign state itself. The corporations are offering a large amount of capital inflow and in return the prospective country essentially lets the corporations and it's lawyers dictate the tax and privacy laws.[77] This is why scholars who have written on the subject simplify the concept by saying LTJs are selling their sovereignty when they become LTJs.[78] LTJs came to be when opportunity (state sovereignty and globalized economy) met demand (MNEs seeking to lower their tax burdens).[79]

III. CHALLENGES TO PAST SIMILAR AGREEMENTS

The newest OECD and G20 Agreement is the most comprehensive and aggressive international approach that has ever been taken to control LTJs; however, it is not the first. Viewing the past can provide a glimpse into how well the current agreement will work.

In the late 90s and 2000s, both the G20 and the OECD set low tax jurisdictions as one of their main issues of concern.[80] They both attempted to identify countries that were LTJs and drew up mitigating agreements to present to these countries.[81] Similarly, they both created their own forums and groups to research LTJs and methods of combating the alleged harmful effects they have on the world.[82] Overall, most of their efforts have had little impact on the usage of these jurisdictions. However, they have done three things: raised

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[74] DAINOFF, *supra* note 39, at 14.

[75] DAINOFF, *supra* note 39, at 14.

[76] DAINOFF, *supra* note 39, at xii.

[77] DAINOFF, *supra* note 39, at 23.

[78] DAINOFF, *supra* note 39, at 23.

[79] DAINOFF, *supra* note 39, at 23.

[80] DAINOFF, *supra* note 39, at 62–65.

[81] DAINOFF, *supra* note 39, at 62–65, 79–80.

[82] DAINOFF, *supra* note 39, at 62–65, 79–80.

awareness of corporate tax mitigation, increased transparency measures of companies that use LTJs, and increased the cost of using LTJs.[83]

A. Past OECD Efforts

In 1998, the OECD published a paper titled "Harmful Tax Competition: An Emerging Global Issue."[84] Soon after, it formed the Forum on Harmful Tax Competition (FHTP), which is dedicated to performing tax research to identify countries that are engaging in what the OECD considers harmful tax behaviors.[85] This early tax research group differentiates between "harmful" tax regimes and "preferential" tax regimes.[86] "Preferential" tax regimes are, according to the FHTP, countries with low or no corporate income taxes only for non-residents, and countries with intentionally stringent privacy laws for their financial sectors.[87] These are all the necessary characteristics to allow organizations to minimize taxes.[88] "Harmful" tax regimes were defined as countries with the same three characteristics who also actively advertised their countries as being a place for foreigners to put capital to avoid taxation in their resident countries.[89]

Another distinction the FHTP drew between preferential and harmful tax regimes was their lack of transparency to outside governments. Why this distinction was drawn is unclear. Surely, an LTJ that advertises its status is not more harmful than a country with the same status that is not advertised.[90] The OECD claimed that harmful tax competition altered the location of financial services, eroded the tax base of other countries, diminished global welfare, and led to inequality in the tax system.[91] If we applied the same logic to other forms of "harmful" behaviors of countries in the past, we would think the distinction was ludicrous. For example, is a country who imprisons domestic political opponents for exercising free speech any less harmful because they hide the fact that they do so from the rest of the world? It is arguably no more harmful; however, this is exactly how the OECD began combating LTJs in the 90s. This research came to a culmination in the year 2000 when the OECD started their "name and shame" campaign targeting LTJs that they deemed uncooperative.[92] The list had the names of forty-one countries on it.[93] The criteria for the list was a "harmful" low tax country using the criteria above, who refused to sign a

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[83] DAINOFF, *supra* note 39, at 62–65, 79–80.

[84] OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE (1998).

[85] DAINOFF, *supra* note 39, at 62.

[86] OECD, *supra* note 84.

[87] OECD, *supra* note 84.

[88] PALAN, *supra* note 5, at 30–35.

[89] OECD, *supra* note 84.

[90] OECD, *supra* note 84, at 33–34, ¶78.

[91] OECD, *supra* note 84, at 8, ¶4.

[92] OECD, *supra* note 84, at 8, ¶4.

[93] DAINOFF, *supra* note 39, at 62–65.

memorandum of understanding[94] (MOU) with the OECD.[95] The MOU was an agreement to acknowledge that LTJs were harmful and that the countries would address the issue.[96] Six countries who were originally identified as being "harmful" LTJs were able to keep their name off the list by agreeing to reform their tax codes.[97] This effort by the OECD had some symbolic success as thirty-five of the forty-one countries ended up signing an MOU by August of 2001.[98] The campaign led to very little actual change and was met with pushback from LTJs and politically conservative organizations world-wide.[99] The lack of translation from symbolic to actual success lies in the challenging step from a country signing an international agreement to getting that country to pass legislation changing their laws in accordance with the international agreement.[100]

Instead of having the impact the OECD wanted from their name and shame campaign of lowering the use of LTJs, it had the opposite effect.[101] FDI substantially rose in almost all the blacklisted countries from the years 2000-2018.[102] Part of this was due to the global trend of the time anyway.[103] The twenty first century and its rapid technological growth brought a more globalized economy and increased capital mobility. Among blacklisted countries, there was an average yearly FDI of 5.18 billion in the years 2000-2002.[104] In the period between 2003-2018 after the implementation of the list and pressuring most of the "harmful" countries to sign an MOU that number rose to 9.8 billion.[105] If the program would have accomplished the goals it intended, the

[94] *Memorandum of Understanding (MOU) Defined, What's In It, Pros/Cons, MOU vs. MOA*, INVESTOPEDIA (last visited Nov. 6, 2022), https://www.investopedia.com/terms/m/mou.asp#:~:text=A%20memorandum%20of%20understanding%20(MOU)%20is%20a%20document%20that%20describes,parties%20involved%20in%20a%20negotiation (""A memorandum of understanding is an agreement between two or more parties outlined in a formal document.").

[95] DAINOFF, *supra* note 39, at 62–65.

[96] DAINOFF, *supra* note 39, at 62–65.

[97] DAINOFF, *supra* note 39, at 63 ("Bermuda, The Cayman Islands, Cyprus, Malta, Mauritius, and San Marino were able to keep their names off the list by agreeing to reform.").

[98] DAINOFF, *supra* note 39, at 62–65.

[99] DAINOFF, *supra* note 39, at 64 (noting "(t)he ITIO was joined in their opposition by politically conservative American think tanks like the Center for Freedom and Prosperity, whose influence doubtless contributed to the US Treasury Secretary Paul O'Neill's May 2001 public statement criticizing the OECD's effort as 'too broad,' signaling that the United States support for the anti-LTJ effort going forward would be limited.".

[100] DAINOFF, *supra* note 39, at 63–64.

[101] DAINOFF, *supra* note 39, at 65.

[102] DAINOFF, *supra* note 39, at 65 (noting the "(a)verage FDI flows from 1970-2000 were $962 million, which rose to $5.18 billion for the period between 2000-2002-the time most blacklisted countries spent on the black-list- and nearly doubling to 9.8 billion for the period from 2003-2018.").

[103] DAINOFF, *supra* note 39, at 65

[104] DAINOFF, *supra* note 39, at 65

[105] DAINOFF, *supra* note 39, at 65

FDIs would have decreased.[106] Obviously, the OECD did not force LTJs to change their behavior as they increased total FDI.[107]

Arguably, the program was not a complete failure. LTJs and the ethical implications of them became a mainstream political topic, specifically in the home jurisdictions of many MNEs such as the U.S. and the European Union(E.U.).[108] Conservative groups such as the Center for Freedom and Prosperity began opposing the OECD and their agenda.[109] Similarly, LTJs themselves had to begin defending their actions on the world stage.[110] They even went as far as to form their own international group called the International Tax and Investment Organization (ITIO).[111] They argued that it was unfair that LTJs did not get to help draft the new policies they were being asked to adopt.[112] Furthermore, the ITIO pointed out that the OECD only blacklisted countries who were not a part of their organization and overlooked LTJs like Switzerland and Luxembourg.[113] Nonetheless, efforts such as the OECD's attempt to create a list of harmful tax jurisdictions pushed the issue into mainstream politics which was an integral part of forming agreements such as the newest Two-Pillar agreement.

B. Early G20 Action

Despite the blacklist created by the OECD in the year 2000, LTJs lived on and thrived. In 2008, governments around the world began putting the finance industry under a microscope when the global financial market collapsed.[114] The G20 Summit had its first "leaders meeting" in November of 2008, in response to the financial crisis.[115] One specific finding by the German tax authorities was that wealthy German citizens were doing their banking in Lichtenstein to avoid paying taxes in Germany.[116] This brought more attention and concern to global LTJs and the G20 decided to team up with the OECD to address them.[117] G20

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[106] DAINOFF, *supra* note 39, at 65

[107] Dainoff, *supra* note 39, at 65.

[108] Ronen Palan, *History of Tax Havens*, HIST. & POL'Y (Oct 1, 2009), https://www.historyandpolicy.org/policy-papers/papers/history-of-tax-havens.

[109] DAINOFF, *supra* note 39, at 63–64.

[110] DAINOFF, *supra* note 39, at 63.

[111] DAINOFF, *supra* note 39, at 63.

[112] DAINOFF, *supra* note 39, at 63.

[113] DAINOFF, *supra* note 39, at 63.; *see also* PALAN, *supra* note 5.

[114] PALAN, *supra* note 5, at 161.

[115] *Washington D.C. United States 2008*, OECD (last visited Nov. 6, 2022), https://www.oecd.org/g20/summits/washington-dc/ (showing the group was originally compromised of financial ministers of the countries involved however in 2008 the leaders of the respective countries made their first appearance. "Initiated by Finance Ministers in 1999, the Group of 20 (G20) met at Leaders' level for the first time in November 2008 in Washington, D.C., at the peak of the global financial crisis.").

[116] DAINOFF, *supra* note 39, at 79.

[117] DAINOFF, *supra* note 39, at 79.

officials asked the OECD to come up with a new blacklist of LTJs and to specifically include European countries such as Switzerland, Luxembourg, and Lichtenstein.[118] At the 2009 London G20 summit, the OECD presented two lists.[119] One was a "grey list" that included LTJs who had agreed to adopting a new tax system but had yet to implement any real change in their tax code.[120] The other was once again a "blacklist" of LTJs who refused to sign an MOU with the OECD during their first effort.[121] To be removed from the either of the lists, LTJs had to sign tax treaties with at least twelve countries.[122] Refusing to do so would warrant sanctions from the G20 countries.[123] These agreements were bilateral agreements that allowed transparency into taxing and banking practices within the LTJs.[124] While seeming like a good idea, the bar for getting "whitelist" status was far too low and had little to no impact on LTJs.[125][126]

The threatened sanctions caused all the blacklisted countries to comply within a week.[127] However, in line with the common theme of the story, low tax countries were able to comply with the demands and satisfy the G20 leaders while simultaneously not changing their behavior.[128] Two jurisdictions, Greenland and the Faroe Islands, specifically stood out as enablers that allowed LTJs to sign treaties without enforcing new provisions or taxing revenue in any way.[129] Greenland signed fifty-one tax treaties and the Faroe Islands signed fifty-three in total to help LTJs meet their treaty quota.[130] From there, many LTJs signed treaties amongst themselves or found other countries willing to make a deal with them that allowed a continuation of the status quo while meeting their treaty quota.[131] The results of this approach were the same as before: being on the G20 blacklist had no significant impact on FDI inflows after the agreement was signed by the LTJ.[132]

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[118] DAINOFF, *supra* note 39, at 79.

[119] DAINOFF, *supra* note 39, at 79.

[120] DAINOFF, *supra* note 39, at 79.

[121] DAINOFF, *supra* note 39, at 79.

[122] DAINOFF, *supra* note 39, at 79.

[123] DAINOFF, *supra* note 39, at 80.

[124] DAINOFF, *supra* note 39, at 80.

[125] DAINOFF, *supra* note 39, at 79 (noting the "whitelist" was a list that a blacklisted country could get on if they "substantially implemented the international agreed tax standard.").

[126] DAINOFF, *supra* note 39, at 81.

[127] DAINOFF, *supra* note 39, at 80.

[128] DAINOFF, *supra* note 39, at 80.

[129] DAINOFF, *supra* note 39, at 80.

[130] DAINOFF, *supra* note 39, at 80.

[131] DAINOFF, *supra* note 39, at 80.

[132] DAINOFF, *supra* note 39, at 80–81 (noting that signatories of the agreement and non-signatories had effectively the same growth rate in FDI in the years before and after the agreement).

Thus far, there have been two organized attempts by the OECD and the G20 to address the perceived issue of low tax jurisdictions.[133] Both efforts had limited administrative success that achieved some preliminary goals but did not accomplish the larger goal of curbing investment into LTJs.[134] Since then, LTJs and MNEs use of them has stayed relatively stable.[135] LTJs and tax reforms continue to be a mainstream political issue.[136]

IV. THE G20 SUMMIT AND THE NEWEST OECD PLAN

Governments all around the world who have not participated in the race to the bottom have a strong interest in curtailing the amount of money that flows into LTJs. Recently, the OECD and the G20 came up with a new plan to address LTJs internationally.[137] At the Rome G20 summit in October of 2021, all G20 countries endorsed the two-pillar plan.[138] In total, about 140 countries agreed to adopt the OECD plan representing over ninety percent of the world's GDP.[139] While international agreements are not particularly binding, advocates believe this is a significant step in controlling MNEs and their use of LTJs. This paper will argue that LTJs make international capital investments more affordable for MNEs, leading to a stronger global economy that provides better individual outcomes for all countries. In summary, the negative impacts of widespread adoption of the OECD agreement will outweigh the positive benefits.

The agreement was largely written by the OECD and has two independent pillars.[140] The two pillars are a set of model standards, regulations, and procedures that the OECD and its proponents believe will "tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax

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[133] DAINOFF, *supra* note 39, at 80–81.

[134] DAINOFF, *supra* note 39, at 79–100.

[135] DAINOFF, *supra* note 39, at 79–100.

[136] *See* Katie Warren, *The Top 15 Tax Havens Around the World*, INSIDER (Nov. 19, 2019, 10:24 AM), https://www.businessinsider.com/tax-havens-for-millionaires-around-the-world-2019-11; Ana Swanson, *How the U.S. Became One of the World's Biggest Tax Havens*, WASH. POST (April 5, 2016, 1:07 PM), https://www.washingtonpost.com/news/wonk/wp/2016/04/05/how-the-u-s-became-one-of-the-worlds-biggest-tax-havens/.

[137] *About Us*, OECD, https://www.oecd.org/about/ (last visited Nov. 6, 2022) (noting the OECD is an international organization whose purpose is to optimize the global economy for fairness and justice with the stated goal "to shape policies that foster prosperity, equality, opportunity and well-being for all.").

[138] James McBride et al., *What Does the G20 Do?*, COUNCIL ON FOREIGN REL., https://www.cfr.org/backgrounder/group-twenty (last visited Nov. 6, 2022) (noting the G20 summit is an informal meeting of the 20 largest economic powers in the world that meet to discuss a wide range of international issues such as the global economy. Together the 20 countries (including the entire European Union as one entity) make up eighty percent of the world's GDP).

[139] *Case Study: Global Tax Deal*, TAX FOUND., https://taxfoundation.org/taxedu/educational-resources/case-studies-oecd-global-tax-deal/ (last visited Nov. 6, 2022) [hereinafter Case Study].

[140] *Id.*

environment and address the tax challenges arising from the digitalization of the economy."[141]

As one could imagine, politicians in high tax jurisdictions have a strong interest in stopping corporations and wealthy individuals from using LTJs. The new OECD agreement will increase MNEs total tax bill every year and the amount spent on tax compliance.[142] Furthermore, the cost of investment into any international jurisdiction will substantially increase. [143] Foreign direct investment benefits both the country of the parent company as well as the country being invested in.[144] An increase in the cost of FDI will decrease the amount of FDI around the world, hindering the advancement of developing economies and investment back into the country of the parent company.

A. Pillar One

The first pillar is designed to address MNEs moving their profits from the country it is produced in to a country with favorable tax rates.[145] It is formulated to expand the taxing power of countries to tax MNEs regardless of where it exists on paper.[146] For example, if an MNE were to exist in the Bahamas but make most of its profits in the U.S., Pillar One expands the power of the U.S. to tax those profits even though the revenue is moved to the Bahamas. It works by adopting a tax calculation formula that includes the location the revenue was made. Pillar One only targets MNEs above a certain threshold of revenue and profitability. [147] Companies who make more than twenty billion euros(approximately 26.4 billion U.S. dollars) in annual revenue and have at least a ten percent profit margin would be subject to having twenty-five percent of their profit over a ten percent profit margin subject to the new formula.[148] For example, imagine a company that has forty billion U.S. dollars in revenue and ten billion in profits thus meeting the threshold numbers. The excess amount of money beyond the ten percent profit margin is money that would be subject to the formula. So, in this case one and a half billion dollars is the amount subject to the new formula that includes where the revenue was produced.[149] This could have interesting effects on tech companies by allowing countries to tax profits

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[141] *International Collaboration to End Tax Avoidance*, OECD, https://www.oecd.org/tax/beps/ (last visited Nov. 6, 2022).

[142] Daniel Bunn, *A Global Minimum Tax and Cross Border Investment: Risks and Solutions*, TAX FOUND. (June 17, 2021), https://taxfoundation.org/global-minimum-tax/.

[143] *Id.*

[144] *See* discussion *infra* pp. 44–46 and note 220.

[145] *Case Study*, *supra* note 139.

[146] *Case Study*, *supra* note 139.

[147] *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy*, OECD (Oct. 8, 2021), 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,[hereinafter *Statement]*.

[148] *Id.* at 1.

[149] *Case Study*, *supra* note 139.

made on digital users in their territory when the MNE has no physical presence there.[150]

Also present in Pillar One of the tax agreement is the intent to lower the threshold to overtime target more companies. The agreement aims to lower the twenty billion euro revenue threshold to ten billion euros.[151] Pillar One also contains model policies that would require corporations to track and identify the final consumers of their products even through a long supply chain where they may be wholesaling to another MNE rather than bringing their products directly to the consumer.[152]

B. Pillar Two

Of the two pillars in the agreement, Pillar Two has certainly gotten the most press since its endorsement from the G20. This portion includes a recommendation for a global minimum corporate tax.[153] Pillar Two has three main rules and a fourth rule for guidance on tax treaties.[154] It has two interlocking rules that are collectively titled the Global Anti-Base Erosion Rules (GloBE).[155] Furthermore there is an Income Inclusion Rule (IIR) and an Under Taxed Payment Rule (UTPR).[156] The policies described in Pillar Two are more inclusive regarding the companies it effects by being enforced against MNEs with annual revenue above 750 million euros.[157]

Rule one is a domestic minimum tax the OECD believes all countries should be charging corporations within their borders.[158] This rule directly targets current LTJs by trying to get them to amend their corporate tax rates to be higher. The OECD recommends all countries have a minimum corporate tax of fifteen percent which means largely no change in countries that are home to many MNEs that are not LTJs.[159] For example, the G20 countries collectively have an average corporate tax rate of about twenty seven percent.[160] By comparison, one of the most famous LTJs in Europe, Ireland, has a twelve and

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[150] *Case Study*, *supra* note 139.

[151] *Statement*, *supra* note 147, at 1.

[152] *Statement*, *supra* note 147, at 2 ("To facilitate the application of this principle, detailed source rules for specific categories of transactions will be developed. In applying the sourcing rules, an in-scope MNE must use a reliable method based on the MNE's specific facts and circumstances."); *see also Case Study, supra* note 139.

[153] *Statement*, *supra* note 147, at 4 ("The minimum tax rate used for purposes of the IIR and UTPR will be 15 percent.").

[154] *Statement*, *supra* note 147, at 3.

[155] *Statement*, *supra* note 147, at 3; *see also* Daniel Bunn & Sean Bray, *The Latest on the Global Tax Agreement*, TAX FOUND., https://taxfoundation.org/global-tax-agreement/(last visited Nov. 6, 2022).

[156] *Statement*, *supra* note 147, at 3.

[157] *Case Study*, *supra* note 139.

[158] Bunn and Bray, *supra* note 155.

[159] Sean Bray, *Corporate Tax Rates Around the World, 2021*, TAX FOUND. (Dec. 9, 2021), https://taxfoundation.org/data/all/global/corporate-tax-rates-by-country-2021/.

[160] *Id.*

a half percent corporate tax rate.[161] Some other notorious international LTJs such as the Cayman Islands, US Virgin Islands, and Bermuda have no statutory corporate tax rate.[162]

Rule two has a specific set of income inclusion rules that would govern countries when making money in a foreign jurisdiction.[163] To illustrate, imagine the subsidiaries that MNEs set up in LTJs to take advantage of the lower rates. The OECD created rule two to give countries a system to tax revenue being attributed to a foreign country when it should be taxed within the location of the parent company.[164]

It is likely rule two would lower the amount of FDI worldwide and limit the countries that FDI goes to.[165] By taxing profits reported in a foreign jurisdiction, a country makes it more expensive for companies to branch out and do business in other countries. In other words, this will disincentivize foreign direct investments from MNEs who reside in developed economies like the U.S., Great Britain, and Japan.[166]

The third rule in Pillar Two targets corporate revenues that are not being adequately taxed in low tax jurisdictions.[167] Rule three provides guidelines for countries to tax companies on profit being made by a related company in a tax jurisdiction that has a corporate tax below fifteen percent.[168] Additionally, it provides guidelines for when multiple countries are taxing a corporation for its dealings in a jurisdiction with a low rate.[169] Countries are supposed to cooperate and divide the tax revenue based on tangible assets and employees within each respective jurisdiction.[170] For instance, assume the U.S. and Great Britain are both attempting to tax Acme Corp's profits in the Cayman Islands because the

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[161] *Id.*; *see also* Melissa Geiger & Sharon Baynham, *Global Minimum Tax: An Easy Fix?*, KPMG, https://home.kpmg/xx/en/home/insights/2021/05/global-minimum-tax-an-easy-fix.html (last visited Nov. 6, 2022) (noting that Ireland throughout these negotiations has been supportive of a global minimum tax to be set at 12.5 percent unsurprisingly); *See also* Jasper Jolly, *Ireland Will Resist Global Corporate Tax Rate, Says Finance Minister*, THE GUARDIAN (Apr. 21, 2021, 2:55 PM), https://www.theguardian.com/business/2021/apr/21/ireland-will-resist-global-corporate-tax-rate-says-finance-minister (reporting that Ireland's finance minister verbalized Ireland's intention to defy the 15 percent global minimum corporate tax claiming it is unfair for smaller countries like Ireland, who are at an inherent disadvantage, to compete with larger economies).

[162] Bray, *supra* note 159.

[163] Bunn & Bray, *supra* note 155.

[164] *Case Study*, *supra* note 139.

[165] Bunn & Bray, *supra* note 155.

[166] Bunn & Bray, *supra* note 155.

[167] Bunn & Bray, *supra* note 155.

[168] Bunn & Bray, *supra* note 155.

[169] Bunn & Bray, *supra* note 155.

[170] OECD, Tax Challenges Arising From Digitalization - Report on Pillar Two Blueprint 124 (Oct. 14, 2020) (noting "(b)ecause the UTPR has the potential to apply in any jurisdiction where a Constituent Entity makes an intra-group payment and because the outcomes under UTPR will vary based on the amount of intragroup payments made by each entity, the UTPR is a more complex rule to apply and requires a greater amount of co-ordination between jurisdictions than the IIR.").

Cayman Islands did not amend their tax code to reflect the fifteen percent global minimum tax rate. Great Britain and the U.S. would compare applicable metrics such as tangible assets and employees within their respective borders to divide the extra tax on Acme's Cayman Island profits. They might for example decide twenty percent of the revenue should go to Britain and eighty percent to the U.S. based on a calculation of held assets.

Rule three is meant to counter the effect that LTJs holding out on the agreement will have.[171] This paper has already discussed the benefits available to small developing countries with little to no options for industry.[172] They rely heavily on foreign direct investments to gain capital and grow their economies.[173] The biggest hurdle for any global minimum tax is convincing LTJs to cooperate.[174] Rule three of the OECD agreement suggests the OECD believes LTJs will not cooperate. All the rules of Pillar Two, especially rule three, are designed to strongly disincentivize foreign direct investment into LTJs from MNEs. In short, Pillar Two's first three rules are meant to ensure that companies are being taxed in every jurisdiction in which they operate by giving countries a reliable method to tax revenues booked in LTJs.[175]

Rule four is a subject to tax rule meant to be a framework for international tax treaties that allow countries to tax companies that would otherwise be subject to extremely low taxes.[176] It is just a compliment to the first three model rules and does not change anything to a great extent.

C. Barriers to Implementation

Of the two pillars, Pillar One is going to be the most challenging to implement because all countries must uniformly adopt it to have an impact.[177] Recall that Pillar One integrates the location revenue which is made into the tax calculation.[178] Pillar one is designed to redistribute taxes from the country a company calls home to the country where its revenue is made.[179] Thus, if only some countries implement Pillar One, it could unevenly distribute taxes to countries that adopt Pillar One, raising revenue for them. A disproportionate amount of tax revenue going to specific countries that participate in the program

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[171] *Id*. at 124, ¶457 (noting "(t)he IIR provides for a mechanism to collect the top-up tax based on a Parent's direct or indirect ownership of the low-tax Constituent Entities. The UTPR serves, in part, as a backstop to the IIR and reduces the incentives for tax driven inversions by providing a mechanism for making an adjustment in respect of any remaining top-up tax in relation to profits of a Constituent Entity that is not in scope of an applicable IIR.").

[172] DAINOFF, *supra* note 39, at 13.

[173] DAINOFF, *supra* note 39, at 13.

[174] See section II of this paper.

[175] Bunn & Bray, *supra* note 155.

[176] Bunn & Bray, *supra* note 155.

[177] Bunn & Bray, *supra* note 155.

[178] Bunn & Bray, *supra* note 155.

[179] Bunn & Bray, *supra* note 155.

hardly seems to foster "prosperity, equality, opportunity and well-being for all."[180]

Pillar Two will be effective regardless of the number of countries that adopt it.[181] Pillar Two outlines rules that countries can adopt to ensure corporations are paying at least a fifteen percent tax rate on all of their profits regardless of the location they were made or where the company "books" them at.[182] Certainly, the number of countries that adopt Pillar Two rules will determine the extent to which it is successful. Adopters of Pillar Two's rules will only be impacting MNEs who have a branch in any country that adopts the rules or generates revenue within a jurisdiction that has adopted parts of the rule.[183] Thus, if only one or two countries adopt Pillar Two's rules, they will fail to have a significant effect on the amount of tax paid by MNEs but they may increase their own countries revenue. This is important because as we will see, some of the largest players in the game have the greatest political challenges to adopt the new tax code.[184]

Overall, the two pillar BEPS agreement created by the OECD and formally endorsed by the G20 is a more comprehensive plan attempting to persuade LTJs to reform their polices and ensure MNEs pay more money in taxes.[185] The framework would make it possible for high tax jurisdictions to enforce taxes on MNEs operating in low tax jurisdictions, thus solving the issue of noncompliance by low tax jurisdictions.[186]

Below this paper argues the new tax agreement will make it more expensive for MNEs to use LTJs and will cost MNEs more money in general. This will result in less foreign investment as well as lower domestic investment specifically from mid to small sized MNEs. In the aggregate, this will have a negative impact on economic growth, job outlooks, and consumers.

V. IMPACT ON COMPANIES

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[180] *About Us*, *supra* note 137.

[181] Recall that the two pillars are "independent" from one another thus a jurisdiction could adopt one and not the other. Furthermore, you will see later that there is a likelihood that jurisdictions adopt modified versions of both pillars rather than wholly accepting the entire pillars into their tax codes.

[182] Bunn & Bray, *supra* note 155.

[183] This could lead to disparate impacts between MNEs. MNEs who do very little business in jurisdictions that adopt the rule will be affected much less than MNEs that do a lot of business in many countries who adopt the rules.

[184] *See* Bunn & Bray, *supra* note 155 (talking about how the United States Congress has not yet adopted any changes in line with the global tax deal).

[185] *What is BEPS*, OECD, https://www.oecd.org/tax/beps/about/ (last visited Nov 7, 2022)("[T]o tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.").

[186] *Id.* ("Countries now have the tools to ensure that profits are taxed where economic activities generating the profits are performed and where value is created.").

Politicians supporting the OECD deal and a global minimum corporate tax more broadly, have their eyes on the amount of revenue a global minimum tax would produce for them.[187] The OECD estimates that implementation of its plan would produce an extra $56-102 billion U.S. dollars in new tax revenue every year.[188] On its face, this seems like a great thing, yet fails to address the negative impacts the deal could have on companies, domestic economies, and the global economy at large. Implementation of this plan will raise the cost of having global operations in any industry. It will do this by raising administrative cost to MNEs as well as the cost of foreign investment. It will not only raise taxes on MNE's operations in LTJs but also within already high tax countries from the removal of domestic tax incentives. In turn, this will cause a slowing global economy, fueled by decreased foreign investment. This will further result in less overall corporate investment leading to negative impacts on workers and consumers globally.[189]

A. More Expensive For MNEs

1. Higher Administrative Costs for Compliance

The two-pillar system laid out by the OECD will make taxation for MNEs far more complicated, forcing them to spend more money on administrative costs related to compliance.[190] One of the most important parts of the agreement is to ensure taxes are paid in the country where the revenue was produced.[191] MNEs will need to calculate a separate tax burden in every jurisdiction they derive revenue from. Adding to the complexity of this issue is the fact that the OECD rules include a provision that necessitates the tracking of goods to determine their place of consumption for revenue calculations.[192] Even a wholesale company who provides manufacturing materials could be liable for a tax burden, despite never doing business globally.[193] None of this so far would be too huge of a compliance burden to overcome if, hypothetically, the suggested rules are adopted uniformly by every country.[194] Companies will no longer have the ability to predict where they will incur a tax liability and preemptively become familiar

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[187] *Id.*

[188] OECD, Tax Challenges Arising from Digitalisation – Economic Impact Assessment, 15 (Oct. 12, 2020), https://doi.org/10.1787/0e3cc2d4-en.

[189] Bunn & Bray, *supra* note 155.

[190] Vikas Vasal et al., *Understanding the Global Implications of Pillar Two Model Rules*, Grant Thornton (Jan. 26, 2022), https://www.grantthornton.global/en/insights/articles/understanding-the-global-implications-of-pillar-two-model-rules/.

[191] Bunn & Bray, *supra* note 155.

[192] *Case Study*, *supra* note 139.

[193] *Case Study*, *supra* note 139.

[194] If every country an MNE does business in had the exact same tax code the MNE would only need to learn one tax code to comply with. Because of that, it is only theoretically possible that the world will adopt identical tax codes and given that the new rules allow a country to tax revenue being "booked" in a low tax jurisdiction, an MNE will need to comply with the tax code of any country who uses that power. This is different from the current system where an MNE can choose their jurisdiction and in doing so is able to accurately predict their tax burden and easily comply.

with the jurisdiction. A company will need to worry about the possibility of having a tax liability in an unexpected jurisdiction they now need to be compliant with. The problem stems from the agreement not being uniformly adopted. An international agreement is in no way binding or capable of changing domestic law in and of itself. [195] International agreements are strong recommendations and expressed intentions by politicians to try to implement the recommendations. All 130+ countries are going to pass differing versions of the OECD recommendations. They will all have varying criteria and different formulas to calculate one's tax burdens and companies could be responsible for understanding their tax liabilities in every country.[196] It has been necessary for MNEs in the past to calculate their tax liability in all the jurisdictions they do business in.[197] However, MNEs have never before not been able to predict where they will incur a tax liability. In essence, MNEs may have to calculate separate tax liabilities in two separate countries on one portion of revenue, which has never been necessary before.[198] The added complexity to the tax system will create an unprecedented need for international cooperation between tax agents located in different countries associated with the same MNE raising the administrative costs of taxes on corporations.[199] Later this paper will show through a case study how increasing compliance cost lowers overall investment decreasing economic output which leads to worse outcomes for individuals.

2. FDI Will Cost More and Be Disincentivized

A global minimum tax will raise the "price" of FDI, therefore making MNEs timid about investing their money.[200] When investing capital, MNEs are sensitive to the tax liability they will be subject to.[201] Specifically, medium to small-sized MNEs are most affected by the tax rate of prospective jurisdictions.[202] Under the current system, MNEs can filter their investment through LTJs and know their liability will not increase to a crippling degree.[203] Thus, the corporation can invest capital into developing countries that would not be economically feasible to invest in but for the LTJs.[204] An investment by an MNE can be beneficial by bringing jobs and a higher quality of life to the citizens of these countries.[205] Having a global minimum tax will make foreign investment more expensive, decreasing the amount of FDI to countries who need

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[195] DAINOFF, *supra* note 39, at 79.

[196] *Case Study*, *supra* note 139.

[197] *Case Study*, *supra* note 139.

[198] *Case Study*, *supra* note 139.

[199] Vasal, *supra* note 191.

[200] Bunn & Bray, *supra* note 155.

[201] Ronald B. Davies et al., *The Impact of Taxes on the Extensive and Intensive Margins of FDI*, 28 INT'L TAX AND PUB. FIN. 434 (2021).

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See* discussion *infra* pp. 44-46 and note 220.

it.[206] As shown by the next case example, stifling FDI has bad outcomes for all parties involved.

As an example, imagine a country that would be a great location for an MNE to expand, because of its available labor force and infrastructure. Unfortunately, this country has an unfavorable corporate tax structure which limits the willingness of MNEs to invest capital. Under the current system, an MNE can invest in that market because they can use a low tax jurisdiction to minimize their overall tax bill.[207] They make the investment, and all the positive externalities of that investment are felt in their home country, the new foreign market, and the low tax jurisdiction.[208] Under the OECD model rules, the MNE will be subject to a fifteen-percent tax, significantly increasing their tax bill.[209] The tax will make FDI less feasible, thus slowing the growth of the firm and the advancement of undeveloped economies.[210]

FDI has positive effects on the parent country of an MNE as well as the global economy.[211] This is a well-established principle even backed up by the OECD, the same organization trying to implement a program that could make FDI significantly more expensive.[212] In developing economies, the benefits are numerous, which is why many have purposefully adopted liberal FDI policies to attract MNEs to develop their economies.[213] In a report on FDI and its effects, the OECD wrote:

> The overall benefits of FDI for developing country economies are well documented. Given the appropriate host-country policies and a basic level of development, a preponderance of studies shows that FDI triggers technology spillovers, assists human capital formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development. All of these contribute to higher economic growth, which is the most potent tool for alleviating poverty in developing countries. Moreover, beyond the strictly economic benefits, FDI may help improve environmental and social conditions in the host country by, for example, transferring "cleaner" technologies and leading to more socially responsible corporate policies.[214]

For developing countries, FDI can provide necessary capital to develop their infrastructure and build their economy, therefore increasing the quality of life for their citizens. From the point of view of the parent country, FDI is positive

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[206] *See* discussion *infra* pp. 44-46 and note 220.

[207] Bunn, *supra* note 142.

[208] Bunn, *supra* note 142.; *see also* OECD, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS (2002).

[209] Bunn, *supra* note 142.

[210] Bunn, *supra* note 142.

[211] Bunn, *supra* note 142.

[212] OECD, *supra* note 208, at 5.

[213] Dainoff, *supra* note 39, at 13.

[214] OECD, *supra* note 208, at 5.

as well; the MNE's home country benefits from more overall economic growth as well as firm growth that stimulates the job market.[215] By having a low tax jurisdiction to facilitate FDI, it is cheaper for companies who invest in a developing economy to reinvest a portion of their profits back into its operations in the parent market, making FDI an overall positive resource for both sides of the deal.[216]

To illustrate both how FDI can have a positive effect on the host and parent country, as well as how poor tax policy can adversely affect nations, one can turn to Puerto Rico and the U.S. as an example. Prior to 1996, Puerto Rico was a popular low tax jurisdiction for U.S. companies to use.[217] § 936 of the U.S. tax code provided an opportunity for U.S. companies to eliminate their tax burdens on revenue created from their operations in Puerto Rico.[218] Professor Juan Carlos Suárez Serrato undertook an in-depth case study of § 936 and the impact of its repeal.[219] The purpose of § 936 was to encourage U.S. companies to create subsidiaries in Puerto Rico and invest in the island's infrastructure.[220] The program was a success and developed the country's economy into a high income jurisdiction with modernized infrastructure. In 1996, due to widespread fear of abuse and lost revenue, the U.S. legislature began changing the code to eliminate the favorable tax conditions of the jurisdiction.[221] While this may have created more revenue for the U.S. government, it also had major impacts on the decision-making of the firms who were using § 936.[222] Repealing § 936 resulted in lower FDI inflow to Puerto Rico.[223] This in turn resulted in lower employment from corporations in Puerto Rico and in the U.S.[224] Professor Suárez Serrato goes even further in his analysis to study the effects on people's lives in areas where the firms who used § 936 were located.[225] He found evidence of reduced job growth, as well as a spike in unemployment benefits and other income supplementing public programs.[226] Professor Juan Carlos Suárez Serrato's extensive research on Puerto Rico is a good example of why it is important for policy makers to consider the effects their policies will have on economic activity in addition to the larger amount of revenue they will be collecting.[227]

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[215] Ruud de Mooij & Li Liu, *At a Cost: The Real Effects of Transfer Pricing Regulations*, 68 IMF Econ. Rev. 1, 293–94 (2018).

[216] Bunn, *supra* note 142.

[217] Bunn, *supra* note 142.

[218] Bunn, *supra* note 142.

[219] Juan Carlos Suárez Serrato, *Unintended Consequences of Eliminating Tax Havens* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24850, 2019).

[220] Bunn, *supra* note 142.

[221] Suárez Serrato, *supra* note 219, at 6–7.

[222] Suárez Serrato, *supra* note 219, at 9.

[223] Suárez Serrato, *supra* note 219, at 20–21.

[224] Suárez Serrato, *supra* note 219, at 8.

[225] Suárez Serrato, *supra* note 219, at 26–27.

[226] Suárez Serrato, *supra* note 220, at 27.

[227] Suárez Serrato, *supra* note 219, at 27–28.

Using the example of Puerto Rico, we can extract some conclusions about how widespread adoption of the OECD global tax deal could have a negative effect on MNEs and the global economy. When the U.S. allowed Puerto Rico to serve as an LTJ for U.S. companies, it lowered the cost of foreign direct investment into foreign countries.[228] Lowering the cost of FDI has many positive outcomes for countries receiving the capital inflow. It allows them to improve their infrastructure and employment opportunities for their citizens.[229] This also helped the U.S. reduce the cost of many of their operations making it cheaper for them to invest money back into the U.S.[230] Thus, both jurisdictions were able to greatly benefit. Repealing § 936 took those benefits away, increasing the cost of FDI and general operations. Increasing the cost of investment decreased the amount of investment from those companies into Puerto Rico from the U.S.[231]

Widespread adoption of the OECD agreement could have the effect of increasing the cost of FDI for MNEs. Once that happens, companies will be less likely to invest in developing economies that rely on that investment to build their infrastructure and create positive outcomes for their citizens. Similarly, this will increase the cost of doing business internationally. Increasing the cost of doing business will result in lower investment back into the parent company in the home jurisdiction. Thus, the potential increase in tax revenue through the OECD tax agreement will result in lower FDI inflows into developing economies and will make it more expensive for companies to invest in their home country. Lower investment will lead to lower global economic growth overall, worse employment outcomes, and a larger reliance on supplemental income assistance programs.[232]

VI. CONCLUSION

The newest OECD guidelines are the most recent attempt by the OECD to address the perceived issue of corporations using LTJs to lower their tax burden. While it is true that properly addressing the issue may lead to higher total revenue for government, specifically governments of developed countries, this viewpoint does not take into consideration the problem low tax jurisdictions fix. Low tax jurisdictions make it more affordable for companies to invest in foreign countries with developing economies.[233] By decreasing their overall tax burden, companies have the opportunity to insert capital into countries with available labor forces.[234] This leads to development of the country's infrastructure and economy resulting in favorable individual outcomes such as higher median salary and quality of life.[235] Low tax jurisdictions also have benefits for

[228] Suárez Serrato, *supra* note 219, at 27–28.

[229] Bunn, *supra* note 142.

[230] Bunn, *supra* note 142.

[231] Suárez Serrato, *supra* note 219, at 1.

[232] Suárez Serrato, *supra* note 219, at 1*; see also* Case Study, *supra* note 139.

[233] PALAN, *supra* note 5, at 155.

[234] Bunn, *supra* note 142.

[235] *See supra* pp. 44–46; Bunn, *supra* note 142.

individuals in the country of the parent company of the foreign subsidiary.[236] Increasing the global corporate tax rate will have some benefits for the tax revenue of developed countries, however these benefits do not outweigh the positive impacts low tax jurisdictions have on developing countries and the global economy.

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[236] Bunn, *supra* note 142.