

ARTICLES

MINIMUM GLOBAL EFFECTIVE CORPORATE TAX RATE AS GENERAL ANTI-AVOIDANCE RULE

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But there are some areas where we just have to be honest -- it has been difficult to find agreement over the last seven years. And a lot of them fall under the category of what role the government should play in making sure the system's not rigged in favor of the wealthiest and biggest corporations. And it's an honest disagreement, and the American people have a choice to make.

I believe a thriving private sector is the lifeblood of our economy. I think there are outdated regulations that need to be changed. There is red tape that needs to be cut. ... But after years now of record corporate profits, working families won't get more opportunity or bigger paychecks just by letting big banks or big oil or hedge funds make their own rules at everybody else's expense. Middle-class families are not going to feel more secure because we allowed attacks on collective bargaining to go unanswered. Food Stamp recipients did not cause the financial crisis; recklessness on Wall Street did. Immigrants aren't the principal reason wages haven't gone up; those decisions are made in the boardrooms that all too often put quarterly earnings over long-term returns. It's sure not the average family watching tonight that avoids paying taxes through offshore accounts.

The point is, I believe that in this new economy, workers and start-ups and small businesses need more of a voice, not less. The rules should work for them. And I'm not alone in this. This year I plan to lift up the many businesses who've figured out that doing right by their workers or their customers or their communities ends up being good for their shareholders. And I want to spread those best practices across America. That's part of a brighter future.

(Barack Obama, Former President of the United States)¹

I. INTRODUCTION

More than \$2 trillion of foreign profits generated by American multinationals is purposefully locked out of the United States² in order to avoid U.S. taxation upon repatriation and to benefit from the deferral rule of the U.S. Internal Revenue Code,³ which allows U.S. corporations with controlled foreign corporations (CFCs) to defer taxation of the foreign-sourced active income of the CFC subsidiary until it is repatriated

¹ Former President Obama, Final State of the Union, (Jan. 12, 2016) (<http://www.whitehouse.gov/sotu>) (19:40-22:45); <http://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address> [<http://perma.cc/CJN6-2J2G>].

² See *Parking A-Lot Overseas*, CREDIT SUISSE (Mar. 17, 2015), http://doc.research-and-analytics.csfb.com/docView?language=ENG&format=PDF&source_id=em&document_id=1045617491&serialid=jHde13PmaivwZHRANjglDCV3rbEKRE9uz%2bZu3ZXtQu0%3d [<http://perma.cc/8BFZ-R7TZ>] (last visited Nov. 29, 2016); John L. Campbell et al., *U.S. Multinational Corporations' Foreign Cash Holdings: An Empirical Estimate and Its Valuation*, (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277804; REPUBLICAN STAFF, S. FIN. COMM., COMPREHENSIVE TAX REFORM FOR 2015 AND BEYOND (2014).

³ I.R.C. § 951-965.

through dividend distributions to the U.S. parent company.⁴ Several American multinationals, including Apple and Google, used Irish and Dutch and tax haven subsidiaries in tax planning schemes to reduce their American and Worldwide tax liability substantially.⁵ Just recently, The European Commission has concluded that Ireland violated the EU state aid rules by granting undue tax benefits of up to €13 billion to Apple, allowing Apple to pay substantially less tax than other businesses. The Commission determined that Ireland must recover the illegal aid.⁶ The U.S. responded by supporting Apple and all U.S. Multinationals in this litigation.⁷

As the examples above indicate, American multinationals regularly design intricate tax planning schemes within the confines of the Internal Revenue Code and its regulations in order to legally avoid corporate tax.⁸ Furthermore, by disconnecting their tax jurisdiction from their economic jurisdiction, these multinationals are succeeding in substantially reducing their global effective corporate tax rate to as low as 15% for taxes paid to the U.S. government and 19% for taxes paid to the U.S. and foreign governments combined.⁹ While their economic jurisdiction is in the U.S. and other developed and high tax countries, their tax jurisdiction is located in countries which allow for partial and even complete tax avoidance through the use of several loopholes including intra-company loans, transfer pricing, and tax havens. In 2010, more than 70% of U.S. corporate foreign profits were located in Bermuda and the Cayman Islands.¹⁰ These results are not representative of U.S. policy but rather of the failure of the U.S. international tax regime and, more generally, the failure of the world international tax

⁴ See Stephan Shay, *The Truthiness of Lockout: A Review of What We Know*, 146 TAX NOTES 1393 (2015).

⁵ See Edward Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699 (2011); Jesse Drucker, *Google 2.4% Rate Shows How \$60 Billion is Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010), <http://www.bloomberg.com/news/articles/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes> [<http://perma.cc/V849-NQUA>].

⁶ *State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to €13 Billion*, EUR. COMMISSION, http://europa.eu/rapid/press-release_IP-16-2923_en.htm [<http://perma.cc/L39E-NH3P>] (last visited Nov. 29, 2016).

⁷ See DEP'T. OF THE TREASURY, White Paper, *The European Commission's Recent State Aid and Investigations of Transfer Pricing Rulings* (2016), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/White-Paper-State-Aid.pdf> [<http://perma.cc/6EG7-SUU2>]. See also Romero Tavares, Bret Bogenschneider, Marta Pankiv, *The Intersection of EU State Aid and U.S. Tax Deferral: A Spectacle of Fireworks, Smoke, and Mirrors*, 19(3) FLA. TAX REV. 121 (2016); Shafi Khan Niazi, *An Account of Recent Activity of the European Commission on Applying State Aid Rules to Income Taxes: In Retrospect and Prospect* (2016); Liza Lovdahl Gormsen, *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, 10 J. OF EUR. COMPETITION L. & PRAC. 1039 (2016); Elizabeth Jone, *State Aid in the EU through Tax Rulings and Transfer Pricing* (2016).

⁸ See Edward Kleinbard, *Through a Latte, Darkly: Starbucks's Stateless Income Planning*, TAX NOTES 1515, 1535 (Jun. 24, 2013); Antony Ting, *iTax – Apple's International Tax Structure and the Double Non-Taxation Issue*, BRIT. TAX REV. (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411297; Charles Duhigg, David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (Apr. 29, 2012), <http://www.fiaeofnevada.org/wp-content/uploads/AppleSidestepsBillions-NYT-May2012.pdf> [<http://perma.cc/PSX8-KTDV>] (last visited Nov. 27, 2016); Robert Wood, *Twitter Follows Apple, Google, and Facebook to Irish Holy Grail*, FORBES (Oct. 20, 2013) <http://www.bloomberg.com/news/articles/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes> [<http://perma.cc/AWE7-7FUW>] (last visited Nov. 27, 2016).

⁹ See GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* (2015).

¹⁰ See I.R.S., *Statistics of Income* (2014). U.S. Corporations and Their Controlled Foreign Corporations: Number, Assets, Receipts, Earnings, Taxes, Distributions, Subpart F Income, and Related Party Transactions, by Selected Country of Incorporation of Controlled Foreign Corporation, Tax Year 2010.

regime. According to one recent estimate, these failures cost the U.S. Treasury about \$130 billion a year.¹¹

Therefore, the urgent and pertinent challenge is to combat international corporate tax avoidance, in the U.S. and worldwide. This challenge places the economy, society, and democracy at risk.¹² As Thomas Piketty put it clearly:

It is our basic social contract that is at stake. If middle-class taxpayers feel that they are paying higher effective tax rates than those at the top of the pyramid, if small and medium-size businesses feel that they are paying more than our largest companies, then there is a serious risk that the very notion of fiscal consent – which is at the core of modern democracies – will fall apart altogether.¹³

Therefore, it is not surprising that this challenge occupies the headlines of leading newspapers.¹⁴ This issue has dominated public debate in the more formal or political arena and has also captivated the attention and interest of an increasingly involved and demanding general public.¹⁵ It is one of the top priority of policy makers in

¹¹ See ZUCMAN, *supra* note 9, Stephanie Sikes & Robert Verrecchia, *Externalities of Corporate Tax Avoidance* (2014), <http://www.mcombs.utexas.edu/~media/Files/MSB/Departments/Accounting/TARC/2014/Sikes%20Verrecchia%20Paper.pdf> [<http://perma.cc/X2SW-JG45>].

¹² See ZUCMAN, *supra* note 9; Sikes, *supra* note 11.

¹³ Thomas Piketty, *Foreword* to GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* (2015).

¹⁴ See, e.g., *The Great Corporate Tax Dodge*, BLOOMBERG, <http://topics.bloomberg.com/the-great-corporate-tax-dodge/> [<http://perma.cc/RD2P-WL6J>] (last visited Nov. 29, 2016), Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (Apr. 28, 2012), <http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html> [<http://perma.cc/T8SE-8PSH>]; Jesse Drucker, *Google Revenues Sheltered in No-Tax Bermuda Soar to \$10 Billion*, BLOOMBERG (Dec. 10, 2012), <http://www.bloomberg.com/news/2012-12-10/google-revenues-sheltered-in-no-tax-bermuda-soar-to-10-billion.html>; *Richard Waters, Microsoft's Foreign Tax Planning Under Scrutiny*, FIN. TIMES (Jun. 7, 2011), <http://www.ft.com/cms/s/2/0880cd54-90a1-11e0-9531-00144feab49a.html#axzz2sl7hvIaz> [<http://perma.cc/6H6T-8EK8>]; The New York Times published an interactive look at what S&P 500 companies paid in corporate income taxes – federal, state, local and foreign – from 2007 to 2012 according to S&P Capitol IQ, *Across U.S. Companies, Tax Rates Vary Greatly*, N.Y. TIMES, <http://www.nytimes.com/interactive/2013/05/25/sunday-review/corporate-taxes.html?ref=sunday> [<http://perma.cc/HGP7-YV8H>] (last visited Nov. 29, 2016); *Offshore Shell Games 2015*, CITIZENS FOR TAX JUST., http://ctj.org/ctjreports/2015/10/offshore_shell_games_2015.php#.VqLDyPkrJpg [<http://perma.cc/4VD7-QGU6>] (last visited Nov. 29, 2016), *Pulling the Plug: How to Stop Corporate Tax Dodging in Europe and Beyond*, OXFAM, http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bn-pulling-plug-corporate-tax-eu-190315-en.pdf [<http://perma.cc/BSG5-YDPD>] (last visited Nov. 29, 2016).

¹⁵ See *Tax Justice Blog*, TAX JUST. NETWORK, <http://www.taxjustice.net/> [<http://perma.cc/2ARL-L8L3>] (last visited Nov. 29, 2016); AM. FOR TAX FAIRNESS, <http://www.americansfortaxfairness.org/> [<http://perma.cc/3DM5-VLH2>] (last visited Nov. 29, 2016); *Tax Justice Blog*, CITIZENS FOR TAX JUST., <http://ctj.org/> [<http://perma.cc/B9XW-WS3B>] (last visited Nov. 29, 2016); *The Tax Policy Blog*, TAX FOUND., <http://taxfoundation.org/blog> [<http://perma.cc/8GQG-BYVG>] (last visited Nov. 29, 2016); Forstater, Maya & Ramachandran, Vijaya, *How Much Do We Really Know about Multinational Tax Avoidance and How Much Is it Really Worth?*, CTR. FOR GLOBAL DEV. (Dec. 7, 2015), <http://www.cgdev.org/blog/how-much-do-we-really-know-about-multinational-tax-avoidance-and-how-much-it-really-worth> [<http://perma.cc/WH3J-GM7T>]; Paul Buchheit, *6 Facts About Corporate Tax Avoidance*, INST. FOR POL'Y STUD. (Oct. 1, 2015) <http://inequality.org/6-facts-corporate-tax-avoidance/> [<http://perma.cc/S48D-2QLF>].

the U.S., the EU, the OECD and globally.¹⁶ Most American presidential candidates propose international corporate tax reform in their campaigns.¹⁷ Despite the resistance that such proposals continue to face, it seems that, after extensive debates by Congress, reform is imminent – even if limited in scope.¹⁸ On several occasions, including his FY 2016 budget, Former President Obama proposed to expand the corporate tax base by eliminating subsidies and loopholes, and to reduce the main corporate tax rate bracket from 35% to 28%.¹⁹ In addition, he proposed to partially end deferral by imposing a minimum corporate tax rate of 19% on deferred income whether repatriated or not. This minimum tax aims to reduce the incentives for tax avoidance and to keep investments in the United States.²⁰ Former President Obama’s reform proposal added to a broad spectrum of proposals that have been made.²¹

The current international environment in which the U.S. policy and reform proposals are being offered is particularly interesting and unique because the Organization for Economic Cooperation and Development (OECD) had published the final Base Erosion and Profit Shifting (BEPS) Reports²² on October 5, 2015 and the EU recently launched its own Action Plan for Fair and Efficient Corporate Taxation in the

¹⁶ See, e.g., Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, CONG. RES. SERV. (Jan. 15, 2015), <http://www.fas.org/sgp/crs/misc/R40623.pdf> [<http://perma.cc/P9KY-8NHV>]; EUR. COMMISSION, *The Fight against Tax Fraud and Tax Evasion*, http://ec.europa.eu/taxation_customs/taxation/tax_fraud_evasion/index_en.htm [<http://perma.cc/G7UM-PWAX>]; U.K. Government Policy: *Tax Evasion and Avoidance*, GOV.UK, <http://www.gov.uk/government/policies/tax-evasion-and-avoidance> [<http://perma.cc/7WA7-RV84>]; U.K. leads international efforts to clampdown on tax avoidance, GOV.UK, <http://www.gov.uk/government/news/uk-leads-international-efforts-to-clampdown-on-tax-avoidance> [<http://perma.cc/B2F5-2Y9M>]; UN Economic and Social Council President Urges Stronger Cooperation to thwart tax evasion and avoidance, http://www.un.org/apps/news/story.asp?NewsID=52530#.Vr-ia_krJpg [<http://perma.cc/E3CR-5F8>]; UN Committee of Experts on International Cooperation in Tax Matters, <http://www.un.org/esa/ffd/tax/> [<http://perma.cc/577K-J6PH>].

¹⁷ TAX FOUND., *Comparing the 2016 Presidential Tax Reform Proposals*, <http://taxfoundation.org/comparing-2016-presidential-tax-reform-proposals> [<http://perma.cc/ZUK2-9WG6>].

¹⁸ Jeffrey Kupfer, Jonathan Ackerman & Rosanne Altshuler, *How tax reform can get done in 2016*, CNBC (Jan. 21, 2016), <http://www.cnbc.com/2016/01/21/how-tax-reform-can-get-done-in-2016-commentary.html> [<http://perma.cc/Y7SH-EDVF>] “Speaker of the House Paul Ryan announced he will make tax reform—often considered a noble cause but a futile exercise—a priority in the upcoming year. ‘Instead of a tax code that all of us can live by, we have a tax code that none of us can understand,’ he said last month, speaking at the Library of Congress. ‘The only way to fix our broken tax code is to simplify, simplify, simplify. Close all those loopholes and use that money to cut tax rates for everyone.’”; John Harwood, *Despite Pledges, Tax reform Remains and Elusive Goal*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/us/politics/despite-pledges-tax-reform-remains-an-elusive-goal.html?partner=rssnyt&emc=rss&_r=0 [<http://perma.cc/8CLR-GZ9Y>].

¹⁹ As known, the U.S. corporate tax rate includes several gradual marginal rates according to the taxable income of the corporate. However, most corporates fall within the 35% rate bracket.

²⁰ See DEP’T. OF THE TREASURY, *General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals* (2015), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf> [<http://perma.cc/2E54-ABG6>].

²¹ See Jane Gravelle, CONG. RESEARCH SERV., RL34115, *Reform of U.S. International Taxation: Alternatives* (2015).

²² *BEPS 2015 Final Reports*, OECD, <http://www.oecd.org/tax/aggressive/beps-2015-final-reports.htm> (last visited Nov. 5, 2016) [<http://perma.cc/LC6N-LLYP>].

EU as well as the Anti-Tax Avoidance Package.²³ The OECD BEPS Reports propose national, bilateral and multilateral rules on fifteen actions. Generally speaking, the OECD rules fall into the following three main categories: (i) the General Anti-Avoidance Rule to limit tax avoidance through treaty abuses by denying tax treaty benefits if obtaining any such treaty benefits was one of the principal purposes of any arrangement or transaction;²⁴ (ii) the Specific Anti-Avoidance Rules that target specific avoidance strategies and try to neutralize them as effectively as possible, such as limiting interest deductibility and transfer pricing; and (iii) the Disclosure and Transparency Rules that intend to provide tax authorities with the required information in order to apply the anti-avoidance norms and limit international corporate tax avoidance, such as the mandatory disclosure regime in action 12²⁵ and the country-by-country reporting regime in action 13.²⁶ The U.S. participated actively in the BEPS process and discussed these actions and their implications on several occasions. Still, it does not seem that the U.S. is going to implement the OECD proposals.²⁷ However, the U.S. cannot ignore the OECD proposals as they signify substantial impending changes to the realm of international taxation.

In this article, I propose to add a new provision to the U.S. Internal Revenue Code that adopts a minimum global effective corporate tax rate that will serve as a general anti-avoidance rule and is targeted toward international corporate tax avoidance. According to this proposed new section, if the global effective corporate tax rate of any American Multi-National Corporation (MNC) is below 15%, the MNC will then be

²³ Generally speaking, the EU is trying to reform the corporate tax framework in the EU in order to tackle tax abuse, ensure sustainable revenues, and support a better business environment in the Single Market. To this end, the EU is considering several measures including re-launching the Common Consolidated Corporate Tax Base (CCCTB), enacting general anti-avoidance directive, increasing transparency, improving EU coordination. *Action Plan on Corporate Taxation*, EUR. COMMISSION, http://ec.europa.eu/taxation_customs/taxation/company_tax/fairer_corporate_taxation/index_en.htm [<http://perma.cc/9HEG-ZZG4>] (last visited Nov. 5, 2016); *Anti-Tax Avoidance Package*, EUR. COMMISSION, http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm [<http://perma.cc/CZ6D-6LA6>] (last visited Nov. 5, 2016).

²⁴ *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD, <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm> [<http://perma.cc/MC6N-AQJH>] (last visited Nov. 5, 2016).

²⁵ *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, OECD, <http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm> [<http://perma.cc/WH5Y-RKZP>] (last visited Nov. 5, 2016).

²⁶ *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report*, OECD, <http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm> [<http://perma.cc/4P3G-VJWH>] (last visited Nov. 5, 2016).

²⁷ See Daniel Shaviro, *OECD-BEPS: Should the U.S. Be Worried* (Dec. 18, 2015), http://www.law.nyu.edu/sites/default/files/upload_documents/shaviro-revised%20OECD-BEPS.pdf [<http://perma.cc/23KA-Y5SL>]; *The OECD Base Erosion and Profit Shifting report: Should the United States be worried?* (Dec. 18, 2015), American Enterprise Institute, <http://www.aei.org/events/the-oecd-base-erosion-and-profit-shifting-report-should-the-united-states-be-worried/> [<http://perma.cc/FD7W-FXRV>]; See also: Gary Hufbauer et al., *The OECD's "Action Plan" to Raise Taxes on Multinational Corporations*, PETERSON INST. FOR INT'L ECON., Working Paper 15-14 (Sept. 2015).

required to close the gap and pay the U.S. Treasury up to the minimum.²⁸ For purposes of my proposal, the global effective corporate tax rate will be calculated according to the ratio between the global corporate tax paid and the global earnings and profits (E&P) in the financial statements of the MNC.²⁹ The tax imposed according to my proposed rule is an interim liability that serves to limit tax avoidance schemes on international transactions.

I argue that this rule is expected to reduce the incentives for international tax avoidance because all MNCs will be liable for the minimum global effective corporate tax rate no matter which tax-planning scheme is used. In my opinion, this regime improves the fairness and efficiency of the U.S. international corporate tax regime while protecting and maintaining the competitive position of American MNCs in the global digital economy. I contend that my proposal is politically feasible in the U.S. because the U.S. must act in order to protect its base and its multinationals in the new international environment. Without U.S. response, other unilateral or international responses are likely to negatively affect U.S. interests as the State Aid Cases of Apple and other U.S. multinationals reveal. My proposal is feasible since it is consistent with the ideology and interests of both Democrats and Republicans. Furthermore, the Obama Administration has already proposed a similar minimum tax, and the similarities between my proposal and that of the Administration outweigh the differences.³⁰ I use Former President Obama's minimum taxation proposal to support the political feasibility of my minimum taxation proposal, but at the same time, I argue that my proposal is distinct and more appropriate than Former President Obama's proposal and other proposals of minimum taxation such as the Shay, Fleming and Peroni interim minimum tax³¹ and the Grubert, Altshuler minimum tax versions.³² If the United States adopts this proposed rule, it will substantially contribute, through "constructive unilateralism", to international tax reform that will better equip the global community to meet the challenges of a twenty-first century digital economy.³³

This article contributes to a timely issue of international taxation. It brings a fresh perspective on the debate about international corporate tax avoidance. My proposal is innovative and distinct from current discourse and other proposals. Little attention has been given by scholars of *international* corporate tax avoidance to the extensive literature and comparative experience available that addresses: (i) the impact of corporate tax

²⁸ Compare Jeremy Scott, *Obama's Foreign Earnings Tax: 19% Minimum DOA But Deemed Repatriations Key*, FORBES (Feb. 5, 2015, 2:43 PM), <http://www.forbes.com/sites/taxanalysts/2015/02/05/obamas-foreign-earnings-tax-19-minimum-doa-but-deemed-repatriations-key/#58d1046f25f1> [<http://perma.cc/HK36-TSP4>] with Richard Rubin & Jonathan Allen, *Obama Wants a New Tax on U.S. Companies' Overseas Profits*, BLOOMBERG (Jan. 31, 2015 7:07 PM), <http://www.bloomberg.com/news/articles/2015-02-01/obama-said-to-propose-taxes-on-foreign-earnings-offshore-profit> [<http://perma.cc/5X7Q-BTHG>].

²⁹ There are a number of methods that could be (and are) often used to define "effective corporate tax rate", but I have selected this method and will explain my reason in Part V below.

³⁰ See DEP'T. OF THE TREASURY, *supra* note 20.

³¹ See Stephen E. Shay, Clinton Fleming, & Robert J. Peroni, *Designing a 21st Century Corporate Tax – an Advance U.S. Minimum Tax on Foreign Income and Other Measures to Protect the Base*, 17 FLA. TAX REV. 699 (2015).

³² See Harry Grubert & Rosanne Altshuler, *Fixing The System: An Analysis of Alternative Proposals for the Reform of International Tax*, 66(3) NAT'L TAX J. 671 (2013).

³³ See Reuven Avi-Yonah, *Constructive Unilateralism: US Leadership and International Taxation*, Public Law and Legal Theory Research Paper Series (2015).

avoidance at the *national* level and (ii) the government's attempts to limit such behavior, particularly through regulatory reform.³⁴ My proposal deviates from the current puzzling situation in that it utilizes the significant insights that this literature provides in order to improve reform efforts at the international level. Therefore, rather than proposing an entirely new scheme that addresses the challenges presented by international corporate tax avoidance in an isolated manner, my proposal uses relevant experiences at the domestic level in the United States and in other countries as a foundation.

Following this introduction, Part II describes the current U.S. rules of international taxation on outbound and inbound transactions as well as the interaction between these rules and (i) the bilateral rules provided by the U.S. treaty network and (ii) the international norms such as the OECD norms. Furthermore, Part II analyzes the challenges faced by the U.S. and the global tax regime as a result of international corporate tax avoidance. Data is provided to illustrate the impact. Part III explores the current American responses to this challenge. Part IV briefly describes the OECD international response through the BEPS project and examines the interactions between the American responses and the OECD responses. In Part V, I present my proposal in detail, as well as the philosophy and justifications behind it. I compare my proposal to other proposals of minimum taxation, and I respond to counterarguments. I end my article with a brief conclusion.

II. THE CHALLENGE: INTERNATIONAL CORPORATE TAX AVOIDANCE

A. The Current International Corporate Tax Regime on American Multinationals

Three main sources of tax norms determine the tax outcomes of American multinationals on their global activity and profits. The first is the domestic law of both the home country (i.e., the U.S.) and the source country.³⁵ The second is tax treaty law implemented by the U.S. network of bilateral tax treaties³⁶ based mainly on the U.S. Model Income Tax Convention and Model Technical Explanation.³⁷ The third, which is more controversial, relates to international tax norms as developed in customary international tax law or in the treaty network in addition to different documents and guidelines of the OECD and other international organizations.³⁸ The way in which these three sources of tax norms interact is complex.³⁹

³⁴ See Part V, Section B.2 *supra*.

³⁵ The "source country" refers to the country where the income is earned.

³⁶ *United States Income Tax Treaties – A to Z*, I.R.S. (Feb. 22, 2016),

<http://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z> [<http://perma.cc/ZX4J-RW96>].

³⁷ *The U.S. Model Income Tax Convention and Model Technical Explanation*, I.R.S. (Nov. 23, 2015), <http://www.irs.gov/individuals/international-taxpayers/the-u-s-model-income-tax-convention-and-model-technical-explanation> [<http://perma.cc/4L5P-8GEC>].

³⁸ See Reuven Avi-Yonah, *International Tax as International Law*, 57 *TAX L. REV.* 483 (2004).

³⁹ See REUVEN AVI-YONAH, *INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME* (2007).

The U.S. domestic tax law is a hybrid regime that combines worldwide taxation and territorial taxation.⁴⁰ To mitigate double taxation of the foreign-source income of U.S. corporations, the U.S. domestic tax law allows, subject to conditions and limitations, a credit for foreign income taxes. The worldwide pillar, as it applies to corporations, imposes U.S. taxation on U.S. corporations. A U.S. corporation is defined as a corporation that is incorporated in the U.S.⁴¹ Under the “check-the box” regulations, a business entity is generally eligible to choose how it is classified for federal tax law purposes, as a transparent pass-through or opaque entity.⁴² Once defined as a domestic U.S. entity, the entity is subject to current U.S. taxation on its U.S. and foreign source income. However, by investing abroad through foreign subsidiaries, U.S. corporations are able to defer the current U.S. taxation of foreign source income generated through these foreign corporations until such earnings are, if at all, repatriated to the United States as dividends from the foreign subsidiary to the U.S. Parent Corporation. Subpart F of the Code provides a set of anti-deferral rules and subjects “Subpart F Income” of Controlled Foreign Corporations (CFCs) to current U.S. Taxation.⁴³ According to Section 951, every U.S. shareholder of a CFC shall include in his gross income his pro rata shares of the corporation’s Subpart F income. But other foreign income of CFCs continues to enjoy deferral.⁴⁴

In 2004, as a response to the first wave of corporate inversions, Congress enacted Section 7874 of the Code, which serves as an anti-avoidance rule. In corporate inversions, an American parent company is replaced by a parent company in a

⁴⁰ See generally On the U.S. international tax regime, REUVEN AVI-YONAH, DIANE RING, YARIV BRAUNER, U.S. INTERNATIONAL TAXATION (3rd ed., Found. Press 2010); MICHAEL GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAXATION (2003); JOSEPH ISENBERGH, INTERNATIONAL TAXATION: U.S. TAXATION OF FOREIGN PERSONS AND FOREIGN INCOME (4th ed. 2006); JOEL D. KUNTZ & ROBERT R. PERONI, U.S. INTERNATIONAL TAXATION (1991); ADRIAN OGLE, THE PRINCIPLES OF INTERNATIONAL TAX: A MULTINATIONAL PERSPECTIVE (1993); SOL PICCIOTTO, INTERNATIONAL BUSINESS TAXATION: A STUDY IN THE INTERNATIONALIZATION OF BUSINESS REGULATION; Michael Graetz & Michael O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L. J. 1021 (1997); Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301, 1303 (1996); Robert A. Green, *The Future of Source Based Taxation of the Income of Multinational Enterprises*, 79 CORNELL L. REV. 18 (1993); Charles I. Kingson, *The Coherence of International Taxation*, 81 COLUM. L. REV. 1151 (1981).

⁴¹ 26 U.S.C. § 7701(a)(4)(West 2012); 26 U.S.C. § 7701(a)(5)(West 2012).

⁴² See Treas. Reg. § 301.7701-1, *et seq.*; See I.R.S. (2016), http://www.irs.gov/irm/part4/irm_04-061-005.html [<http://perma.cc/A2SF-VDDG>] Victor Fleischer, *If it Looks like a Duck: Corporate Resemblance and Check-the-Box Elective Tax Classification*, 96 Columbia Law Review 518-556 (1996); Thomas Hayes, *Checkmate, the treasury finally surrenders: The Check The BOX Treasury Regulations and Their Effect on Entity Classification*, 54 WASH. & LEE L. REV. 1147 (1997); Henry J. Lischer, *Elective Tax Classification for Qualifying Foreign and Domestic Business Entities Under the Final Check-The-Box Regulations*, 51 S.M.U. L. REV. 99 (1997-1998); Lawrence Lokken, *Whatever Happened to Subpart F? U.S. CFC Legislation After the Check-The-Box Regulations*, 7 FLA. TAX REV. 185 (2005); Steven Dean, *Attractive Complexity: Tax Deregulation, the Check the Box Elections and the Future of Tax Simplification*, HOFSTRA L. REV. 2 (2006); Heather M. Field, *Checking in on “Check-The-Box”*, 42 LOY. L.A. L. REV. 451 (2008).

⁴³ See also, the Passive Foreign Investment Company (PFIC) regime (I.R.C. §1291-§1298) that imposes current U.S. taxation on passive income of Foreign Investment Company.

⁴⁴ See Robert J. Peroni, J. Clifton Fleming, Jr., Stephen E. Shay, *Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455 (1999) (discussing the legislative history and development of deferral and anti-deferral rules and proposing pass through technique for ending deferral); Robert Peroni, *Deferral of U.S. Tax on International Income: End It, Don’t Mend It—Why Should We Be Stuck in the Middle with Subpart F?* 79 TEX. L. REV. 1609 (2001); Keith Engel, *Tax Neutrality to the Left, International Competitiveness to the Right, Stuck in the Middle With Subpart F*, 79 TEX. L. REV. 1525 (2001).

jurisdiction with low corporate taxes.⁴⁵ After the inversion, the un-repatriated foreign earnings of the U.S. company's remaining foreign subsidiaries can be more easily utilized without triggering a taxable repatriation. Once there is a non-U.S. parent, foreign subsidiaries can simply loan their trapped cash to the new foreign parent, or use it to buy company stock, in what are commonly referred to as "hopscotch transactions."⁴⁶ Section 7874 of the IRC denies certain tax benefits of a typical inversion transaction by deeming the new top-tier foreign corporation to be a domestic corporation for all Federal tax purposes.⁴⁷ This specific anti-avoidance rule generally applies to a transaction in which, pursuant to a plan or a series of related transactions: (1) a U.S. corporation becomes a subsidiary of a foreign-incorporated entity or otherwise transfers substantially all of its properties to such an entity; (2) the former shareholders of the U.S. corporation hold (by reason of the stock they had held in the U.S. corporation) 80% or more (by vote or value) of the stock of the foreign-incorporated entity after the transaction; and (3) the foreign incorporated entity, considered together with all companies connected to it by a chain of greater than 50% ownership (that is, the "expanded affiliated group"), does not have substantial business activities in the entity's country of incorporation, compared to the total worldwide business activities of the expanded affiliated group.⁴⁸

As to the territorial taxation pillar of the U.S. law, it imposes current U.S. tax liability on U.S. sourced income, determined according to source rules for each category of income, of nonresident aliens and foreign corporations ("Inbound Activities").⁴⁹ The U.S. tax rules for U.S. activities of foreign taxpayers apply differently to two broad types of income: The first type is U.S.-source income that is "fixed or determinable annual or periodical gains, profits, and income" ("FDAP income"). FDAP income generally is subject to a 30% gross-basis withholding tax. Much FDAP income and similar income is, however, exempt from withholding tax or is subject to a reduced rate of tax under the

⁴⁵ As described recently in a Congressional Research Service paper, "A corporate inversion is a process by which an existing U.S. corporation changes its country of residence. Post-inversion the U.S. corporation becomes a subsidiary of a foreign parent corporation. Corporate inversions occur through three different paths: The substantial activity test, merger with a larger foreign firm, and merger with a smaller foreign firm. Regardless of the form of the inversion, the typical result is that the new foreign parent company faces a lower home country tax rate and no tax on the company's foreign-source income." Donald J. Marples & Jane G. Gravelle, CONG. RES. SERV., R43568, *Corporate Expatriation, Inversions, and Mergers: Tax Issues* 3 (2014).

⁴⁶ See Edward Kleinbard, *Tax Inversions Must be Stopped Now*, WALL ST. J. (July 21, 2014, 8:20 AM), <http://www.wsj.com/articles/edward-d-kleinbard-tax-inversions-must-be-stopped-now-1405984126> [<http://perma.cc/MR46-AS83>]; *Inverse Logic*, THE ECONOMIST (Jun. 21, 2014) <http://www.economist.com/news/business/21604555-rush-firms-fleeing-america-tax-reasons-set-continue-inverse-logic> [<http://perma.cc/H4FY-ZBWU>]; Kimberly Clausing, *Corporate Inversions*, TAX POL'Y CTR. (2014) <http://www.taxpolicycenter.org/UploadedPDF/413207-corporate-inversions.pdf> [<http://perma.cc/UUK7-X968>]; Omri Marian, *Home Country Effects of Corporate Inversions*, 90 WASH. L. REV. 1 (2015).

⁴⁷ On corporate inversions, See, JOINT COMM. ON TAX'N., *Present Law and Issues in U.S. Taxation of Cross-Border Income*, JCX-42-11, 50 (Sept. 6, 2011), Eric Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015).

⁴⁸ See CHARLES H. GUSTAFSON, ROBERT J. PERONI, RICHARD CRAWFORD PUGH, *TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS* 844-849, (2011); Jefferson Vanderwolk, *Inversions Under Section 7874 of the Internal Revenue Code: Flawed Legislation, Flawed Guidance*, 30 NW. J. INT'L. L. & BUS. (2010).

⁴⁹ See Mitchell Kane, *A Defense of Source Rules in International Taxation*, 32 YALE J. on Reg. 311(2015).

Code or a bilateral income tax treaty.⁵⁰ The second type is income that is “effectively connected with the conduct of a trade or business within the United States” (“ECI”). ECI income is generally subject to the same U.S. tax rules that apply to business income derived by U.S. persons. That is, deductions are permitted in determining taxable ECI, which is then taxed at the same rates applicable to U.S. persons.

The second source of tax norms that influence the tax outcomes of U.S. multinationals’ global profits is bilateral tax treaty law. The U.S. has its own Model Income Tax Convention and Model Technical Explanations.⁵¹ Based on this model, which is used as a starting point in bilateral treaty negotiations, the U.S. signed tax treaties with a number of foreign countries.⁵² Under these treaties, residents of the treaty partners are taxed at a reduced rate, or are exempted on certain items of income they receive from sources within the territory of the other partner. The treaties also set rules of relief from double taxation in accordance with the provisions and subject to the limitations set by U.S. law.⁵³ Most U.S. income tax treaties contain what is known as a “saving clause”, which prevents a citizen or resident of the contracting state from using the provisions of a tax treaty in order to avoid taxation of income sourced in his home country.⁵⁴ Most U.S. income tax treaties also include a Limitation on Benefits Provision.⁵⁵ This provision is an anti-treaty shopping provision that intends to prevent residents of third countries from benefiting from what is intended to be a reciprocal agreement solely between the two countries that are party to the treaty. The provision limits the entitlement of treaty benefits to a “qualified resident” and rather than basing this defined term on a determination of purpose or intent, the provision sets forth a series of objective tests. Therefore, a resident of a contracting state that satisfies one of the tests will receive benefits regardless of its motivations in choosing its particular business structure.⁵⁶

In addition to the U.S. Model Tax Convention, the OECD has developed a Model Convention with respect to taxes on income and on capital.⁵⁷ Based on this model, a network of bilateral tax treaties has been signed between countries throughout the world. The OECD has also issued guidelines on the convention and on several specific issues of cross border taxation throughout the years.⁵⁸ These international tax norms influence the

⁵⁰ The United States has set forth its negotiating position on withholding rates and other provisions in the United States Model Income Tax Convention of November 15, 2006 (the “U.S. Model Treaty”). Because each treaty reflects considerations unique to the relationship between the two treaty countries, treaty withholding tax rates on each category of income are not uniform across treaties.

⁵¹ See *supra* note 38.

⁵² See *supra* note 37.

⁵³ U.S. Model Income Tax Convention Article 23 (2006).

⁵⁴ U.S. Model Income Tax Convention Article 1 §4 (2006).

⁵⁵ U.S. Model Income Tax Convention Article 22 (2006).

⁵⁶ See Ruth Mason, *U.S. Tax Treaty Policy and the European Court of Justice*, 59 TAX L. REV. 65 (2005); Leonardo Castro, *U.S. Policy Against Treaty Shopping – From Aiken Industries to Anti-Conduit Regs: Critical View of Current Double-Step Approach in Light of Tax Treaties’ Objectives and Purposes*, 31 VA. TAX REV. 297 (2012); John Bates, Daniel M. Berman, Raphaël Gani, Daniel Gutmann, Takashi Imamura, Gideon Klugman, Alexander Rust, *Limitation on Benefits Articles in Income Tax Treaties: The Current State of Play*, 41 INTERTAX 6&7 (2013).

⁵⁷ OECD, *Model Tax Convention on Income and on Capital 2014* (30 Oct. 2015), http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en [<http://perma.cc/CZM3-8Y24>].

⁵⁸ See Tax Publications by Date, OECD, <http://www.oecd.org/tax/bydate/> [<http://perma.cc/A9FQ-8MGY>].

domestic and bilateral treaty law of many countries. Additionally, American multinationals are influenced by these norms in a few significant ways. First of all, their foreign subsidiaries are often directly subject to bilateral tax treaties enacted according to the OECD model. Second, foreign domestic tax law and practice is influenced by the OECD and indirectly subjects the U.S. multinationals and their CFCs to these norms. Therefore, international tax norms clearly serve as influential and interpretive guidelines in a variety of contexts and constitute a third source of influence over the tax outcomes of American multinationals' global activity and profits.⁵⁹

B. Avoiding the Regime

Within the described regime, American multinationals use several schemes to avoid U.S. taxation, which typically involve utilization of foreign jurisdictions that have low or no taxation at all in order to reduce their overall global effective corporate tax rate. The most basic and frequently used scheme is to “lock out” overseas profits in order to avoid taxation upon repatriation. There are a number of negative outcomes that stem from the lock out effect and influence the U.S. economy and society.⁶⁰ In order to use these profits without tax outcomes, U.S. multinational invert to foreign parental structure and exploit “hopscotch transactions”.⁶¹

Another well-known tax planning scheme is the “Double Irish Dutch Sandwich” used by Google and other high tech multinationals.⁶² In 2003, before its initial public offering (IPO), Google established an Irish Subsidiary, Google Ireland Holdings (GIH) with dual residency: Ireland residency as the place of incorporation for purposes of U.S. tax law and Bermuda Residency as the place of “its mind and management” for purposes

⁵⁹ See AVI-YONAH, *supra* note 39.

⁶⁰ See *LOCKOUT: Flawed U.S. Tax Structure Keeps Trillions Offshore That Could be Invested Here*, H. Comm. on Ways and Means (Aug. 5, 2015), <http://waysandmeans.house.gov/lockout-flawed-u-s-tax-structure-keeps-trillions-offshore-that-could-be-invested-here/> [<http://perma.cc/Z6DB-VW6K>]; *The Tax Break-Down: Preferential Rates on Capital Gains*, COMM. FOR A RESPONSIBLE FED. BUDGET (Aug. 27, 2013), <http://crfb.org/blogs/tax-break-down-preferential-rates-capital-gains> [<http://perma.cc/QX33-ASBQ>].

⁶¹ See Mihir A. Desai & James R. Hines, Jr., *Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions*, 55 NAT'L TAX J. 409, 418-20 (2002); Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807 (2015); Reuven Avi-Yonah & Omri Y. Marian, *Inversions and Competitiveness: Reflections in the Wake of Pfizer/Allergan*, U. MICH. PUB. L. RES. Paper No. 488, 6 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703576, A list of inversion transactions is available at http://media.wix.com/ugd/b391a0_3f1cb05f51d8441ea0e595410365a47f.pdf [<http://perma.cc/4G3U-XDLJ>]; For an example of media coverage of a recent inversion, see Michelle Fay Cortez, *Medtronic Strategy Takes Shape After Biggest Inversion Ever*, BLOOMBERG (Jan. 26, 2015, 6:13 PM), <http://www.bloomberg.com/news/articles/2015-01-26/medtronic-s-strategy-takes-shape-after-biggest-inversion-ever> [<http://perma.cc/NE75-SL7T>]; Trefis Team, *Medtronic to Go Ahead with Covidien Deal Despite Reduced Tax Benefits*, FORBES (Oct. 8, 2014 1:39 PM), <http://www.forbes.com/sites/greatspeculations/2014/10/08/medtronic-to-go-ahead-with-covidien-deal-despite-reduced-tax-benefits/> [<http://perma.cc/FD6W-XGUD>]; *Medtronic's Tax Inversion Lesson*, WALL ST. J. (Aug. 13, 2014 8:45 AM), <http://www.wsj.com/articles/medtronics-tax-lesson-1407883241> [<http://perma.cc/WDW4-P8R7>].

⁶² See Edward Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 706 (2011).

of Irish tax law.⁶³ Google Inc. entered into a cost sharing agreement with its wholly owned subsidiary, under which GIH acquired the rights to Google Inc.'s search and advertising technologies and other intangibles for the territory of Europe, The Middle East and Africa (EMEA). The payment for these rights was approved in an Advance Pricing Agreement (APA) with the Internal Revenue Service, which accepted the payment as reflecting the arm's length price of the rights at that time. GIH licensed the intangible rights of the EMEA territories to its Dutch Subsidiary ("Google BV") which in turn licensed the rights to its subsidiary, Google Ireland Limited (GIL). GIL collects billions of dollars of advertising revenues from the use of those rights in the EMEA territories. Those billions are subject to the 12.5% Irish corporate income tax but GIL deducts large royalty payments made to Google BV for the rights. Google BV will pay Irish tax on these royalty payments but it deducts almost the same amounts paid to GIH. Google BV exists because royalties paid directly from an Irish company to a Bermuda Company are subject to Irish withholding tax but that tax does not apply to an EU resident company, such as Google BV. GIH, in turn, is not paying any tax on these royalties as it is considered a Bermuda resident for purposes of Irish tax law and thus pays no Irish Tax, no U.S. tax as it is considered Irish resident for purposes of the U.S. tax law, and no Bermuda tax. The end result of this scheme is almost zero tax on billions of dollars income from the use of Google Inc.'s search and advertising technologies in the EMEA territories.

In this scheme, in order to protect a preferred low-priced IP transaction from future price intervention, Google exploited the APA procedure by entering into the agreement at early stage of the business, when there was a huge gap of information between the company and the IRS. Google used the jurisdictions of Ireland and Bermuda, with low or no corporate taxes, as well as the lack of coordination between Irish and American residency rules, to shift income to low or no tax jurisdictions without having to shift the proportionate amount of economic activity to these jurisdictions. Furthermore, Google exploited the EU withholding exemption rule to reduce the withholding tax and the deduction of royalties within the same group. In this tax avoidance scheme, Google Inc. produced "stateless income" and substantially reduced its tax bill in its resident country and source countries where it economically advertises and produces income.⁶⁴

These examples and many others are intended to illustrate and clarify that there are endless possibilities of corporate tax avoidance in international transactions. This is because there are many holes in the current domestic U.S. law governing the taxation of international transactions that can be exploited to avoid taxation, such as deferral, the check the box regulations or the definition of corporate residency. Additionally, there are a significant number of holes in the treaty network and worldwide international tax regime because each jurisdiction in the world is sovereign to determine its own tax law and several jurisdictions enact low or no tax regimes for the specific purpose of attracting

⁶³ Recently, Section 43 of the Finance Act of 2014 changed the Irish law. All corporations incorporated in Ireland after January 1, 2015 will be deemed to be Irish corporations, regardless of the location of their headquarters. However, bilateral treaties between Ireland and other jurisdictions that codify the management test, such as those with Malta and United Arab Emirates, are exempted. Finance Act 2014 (Act No. 37/2014) (Ir.), <http://www.irishstatutebook.ie/eli/2014/act/37/enacted/en/pdf> [<http://perma.cc/77NV-LF4H>]. The results of these changes on the avoidance strategy are not fully clear yet.

⁶⁴ Kleinbard, *supra* note 62, at 707-13.

foreign investors, and there is not enough coordination between the tax jurisdictions. As a result, the holes in the treaty network and in the worldwide international tax regime can also be used to avoid taxation, especially corporate tax by multinationals in the global digital economy. Thus, the greatest challenge is limiting, if not eliminating, international corporate tax avoidance, which threatens democracy, and the global economy and society, in a timely and appropriate manner.⁶⁵ In this paper, I concentrate on the U.S. - its international tax regime and multinationals - as the leading economy and player in the international tax arena.

C. The Data

The data on international corporate tax avoidance is immense.⁶⁶ A recent document by twenty-four international tax experts addresses current tax reform efforts in Congress, and includes a comprehensive and precise summary of the data, as well as a bibliography of some of the best scholarly research to date showing how the current tax system enables U.S. firms to pay relatively low effective corporate tax rates.⁶⁷ The experts open by emphasizing that U.S. corporations are more profitable than ever, with \$1.8 trillion in profits in the second quarter of 2015 alone. Their profits as a share of GDP – at 9.8% – are nearly at all-time highs. However, their U.S. taxes as a share of GDP are just 2%, near all-time lows. Additionally, U.S. corporate taxes as a share of federal revenue have plummeted from 32.1% in 1952 to 10.6% in 2014. According to the IRS Statistics of Income, 17% of U.S. corporate foreign earnings and profits in 2010 were earned in corporations incorporated in Bermuda and the Cayman Islands.⁶⁸ Jason Furman, the former chairman of the President’s Council of Economic Advisers, seized on this—when, addressing a group of law students at NYU, he said, “I feel safe in saying that the fact that, in 2010, U.S.- controlled foreign corporation profits represent 1,578% of Bermuda’s G.D.P. and even 15% of the Netherlands’ G.D.P. probably does not simply reflect business decisions made for purely business reasons”.⁶⁹

I will concentrate on studies of effective corporate tax rates, as I find these studies most related to my proposal, although they use several and different methods for defining and measuring the effective corporate tax rate.⁷⁰ Generally speaking, effective corporate tax rate is understood, backward looking, as the ratio of corporate income tax paid to a pre-tax measure of corporate profit over a given period of time. A study

⁶⁵ See Sikes, *supra* note 11.

⁶⁶ For a survey on such data see, ZUCMAN, *supra* note 9; OECD, *Addressing Base Erosion and Profit Shifting*, Annex B (Feb. 12, 2013); Kevin S. Markle & Douglas A. Shackelford, *The Impact of Headquarter and Subsidiary Locations on Multinationals’ Effective Tax Rates*, 28 TAX POL’Y & ECON. 33 (2014).

⁶⁷ See AM. FOR TAX FAIRNESS, *24 International Tax Experts Address Current Tax Reform Efforts in Congress* (September 25, 2015), <http://americansfortaxfairness.org/files/24-International-Tax-Experts-Letter-to-Congress-9-25-15-FINAL-for-printing.pdf> [<http://perma.cc/77NV-LF4H>].

⁶⁸ U.S. Corporations and Their Controlled Foreign Corporations by Selected Country of Incorporation of Controlled Foreign Corporation, Tax Year 2010, I.R.S., <http://www.irs.gov/uac/soi-tax-stats-controlled-foreign-corporations> [<http://perma.cc/C5B5-KGKL>].

⁶⁹ Patricia Cohen, *A Startling Look at How Profits Elude the Taxman*, N.Y. TIMES (Sept. 30, 2014), http://www.nytimes.com/2014/10/01/upshot/a-startling-look-at-how-profits-elude-the-taxman.html?abt=0002&abg=0&_r=0 [<http://perma.cc/TR9J-3QA5>].

⁷⁰ Don Fullerton, *Which Effective Tax Rate?* 2 (NAT’L. BUREAU ECON. RES., Working Paper No. 1123, 1983).

undertaken by Citizens for Tax Justice with The Institute on Taxation and Economic Policy looked at the profits and U.S. federal taxes of the 288 Fortune 500 companies that have been consistently profitable in each of the five years between 2008 and 2012. Some of the key findings of this study are as follows: as a group, the 288 corporations examined paid an effective federal income tax rate of just 19.4% over the five year period – far less than the statutory 35% tax rate; (ii) twenty-six of the corporations, including Boeing, General Electric, Priceline.com and Verizon, paid no federal income tax at all over the five year period; and (iii) a third of the corporations (93) paid an effective tax rate of less than 10% over the period. Of those corporations with significant offshore profits, two thirds paid higher corporate tax rates to foreign governments where they operate than they paid in the U.S. on their U.S. profits.⁷¹

Harry Grubert's recent study analyzed data from a sample of 754 large non-financial U.S. based MNC's obtained from the U.S. Treasury's corporate income tax files. Among several interesting findings, this study found that the average effective foreign tax rate declined from 21.26% in 1996 to 15.86% in 2004. The check the box rules enacted in 1997 seem to have contributed about 1 to 2 percentage points of the approximate 5-percentage point decline in foreign effective tax rates. Lower foreign effective tax rates had no significant effect on a company's domestic sales or on the growth of its worldwide pre-tax profits; lower taxes on foreign income do not seem to promote "competitiveness".⁷²

According to the U.S. Government Accountability Office, profitable U.S. corporations paid U.S. federal income taxes of about 13% of their pre-tax worldwide income in 2010, the most recent year for which are available.⁷³ Kimberly Clausing found that in 2011, nearly half of all U.S. foreign profits (46.5%) were held in just seven tax-haven countries with effective tax rates of less than 6.5%.⁷⁴ Among the interesting findings of Gabriel Zucman is that in 2013, the effective U.S. corporate tax rate was 15% for taxes paid to the U.S. government and 19% for taxes paid to U.S. and foreign governments. Out of the roughly 10 point decline in effective tax rates between 1998 and 2013, about two thirds or more of the decline is attributable to increased profit shifting to

⁷¹ Robert S. McIntyre et. al., *The Sorry State of Corporate Taxes*, CITIZENS FOR TAX JUST. (2014), <http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf> [<http://perma.cc/A52G-GFMZ>]; See also Robert S. McIntyre et. al., *Corporate Tax Payers and Corporate Tax Dodgers 2008-2010*, CITIZENS FOR TAX JUST. (2012), <http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf> [<http://perma.cc/WM9L-8FNT>].

⁷² Harry Grubert, *Foreign Taxes and the Growing Share of U.S. Multinational Company Income Abroad: Profits, Not Sales, are Being Globalized*, 65 NAT'L. TAX J. 247, 278-79 (2012). See also Harry Grubert, *Intangible Income, Intercompany Transactions, Income Shifting, and the Choice of Location*, 56 NAT'L. TAX J. 221 (2003).

⁷³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-520, CORPORATE INCOME TAX: EFFECTIVE TAX RATES CAN DIFFER SIGNIFICANTLY FROM THE STATUTORY RATE 1 (2013).

⁷⁴ Kimberly A. Clausing, *The Nature and Practice of Capital Tax Competition* 10 (2015), <http://poseidon01.ssrn.com/delivery.php?ID=19302111617101007096093084119077018050053039063074059107020117074026013125098012122062055115111018120051031088020081024000029011005029023065113122092067092030001028030057094098101110068104112013107123123117125122004092083010012089074066008008003115&EXT=pdf> [<http://perma.cc/5LUW-GQW2>].

low-tax-jurisdictions.⁷⁵ Zucman estimates U.S. tax losses in the amount of \$130 billion a year and his two figures (below) clarify and summarize the data clearly and sharply:⁷⁶

Chart A

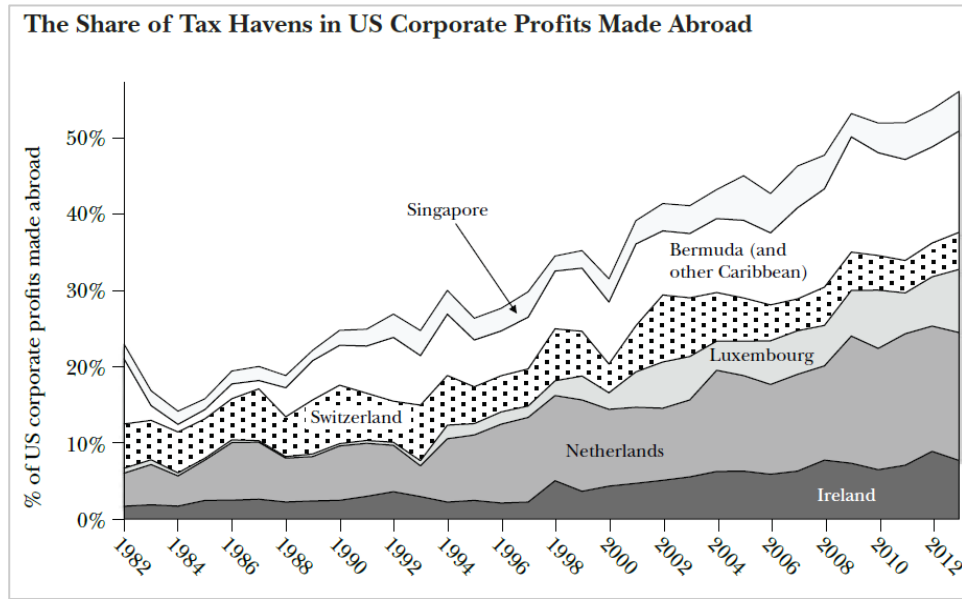
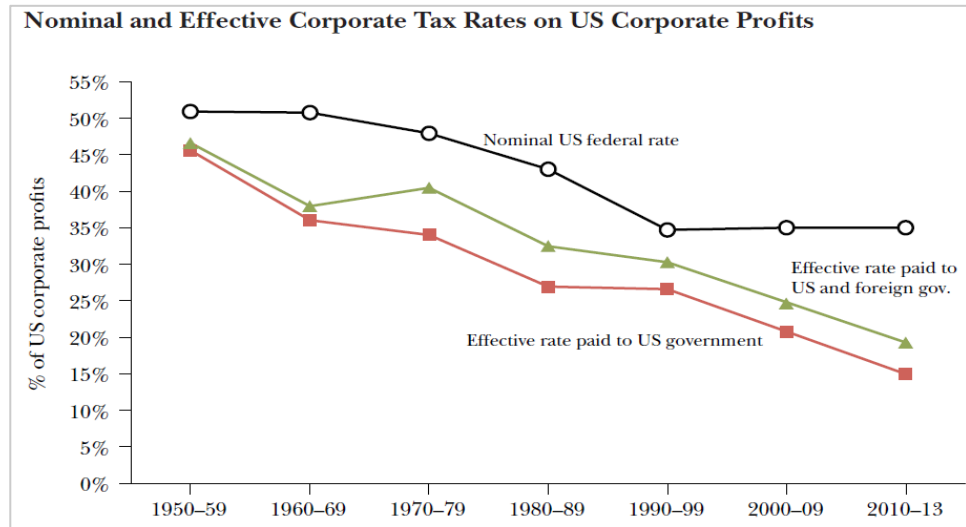


Chart B



⁷⁵ Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits*, 28 J. ECON. PERSPECTIVES 121, fig. 5 at 132-33 (2014).

⁷⁶ Zucman, *supra* note 75, at 106, 108.

In their recent study, Heckemeyer and Overesch present a meta-analysis covering twenty-five studies on corporate profit-shifting behavior.⁷⁷ Among the several contributions, they examined which channel is the leading profit shifting channel and concluded: “Our results indeed provide evidence that the two profit shifting channels, corporate financial policy and tax motivated adjustments of related party transactions, are not equally important. In particular, we find some tentative evidence that the volumes of shifted tax bases are to a large extent, i.e. two thirds, driven by firms’ non-financial inter-company transactions. From the point of view of national governments and tax administrations, this finding can have important implications. The extent of tax base erosion is not determined by the mere responsiveness of the shifting strategies, but also by the tax base volume effectively shifted via the respective channels. Regardless of whether anti-avoidance measures are at all desirable, the discussion on multinational profit shifting and anti-avoidance legislation is very much centered on the financial strategies of firms. Given our findings, doubts remain as to whether this policy matches the true proportion, in terms of the lost taxable bases, of the two shifting channels. If policy makers want to effectively restrict profit shifting opportunities of multinational enterprises (MNEs), restricting transfer pricing and royalties remains a challenging task in anti-tax-avoidance legislation as well.”⁷⁸

III. THE UNITED STATES RESPONSE TO THE CHALLENGE

There is, generally, agreement among scholars and politicians that the current system is broken, but at this point no widely accepted solution has been found. The continuous debate about how best to fix this broken system focuses on a number of challenges including international corporate tax avoidance. At the heart of this controversy is the important underlying question - what should the system achieve?⁷⁹ The scope of current proposals is wide ranging, with suggestions to end deferral and adopting “Current Worldwide Taxation” at one end of the spectrum and ending worldwide taxation in favor of adopting sole “territorial taxation” at the other end. In between these two extremes, several other proposals have been made.⁸⁰ In this part, I will explore and analyze the United States response and the main proposals made and actions taken with an emphasis on the challenge presented by international corporate tax avoidance. For purposes of this article, I assume that the U.S. will not adopt either extreme (Current Worldwide Taxation or sole territorial taxation) and will continue its

⁷⁷ Jost H. Heckemeyer & Michael Overesch, *Multinationals’ Profit Responses to Tax Differentials: Effect Size and Shifting Channels* (CTR. FOR EUR. ECON. RES., Discussion Paper No. 13-045, 2012).

⁷⁸ *Id.* at 27.

⁷⁹ See DANIEL SHAVIRO, *FIXING U.S. INTERNATIONAL TAXATION* (2015); DAVID WEISBACH, *THE USE OF NEUTRALITIES IN INTERNATIONAL TAX POLICY* (2014); Michael Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 BROOK. J. INT’L. L. 1357 (2001).

⁸⁰ I don’t consider here those proposals that call pass through corporate tax or replacement of the corporate tax altogether. My article and proposal is made within the framework of corporate tax. Therefore, I am not going to engage here in the debate about ending corporate tax or adopting VAT in the USA. See Alan Viard, *Fundamental Tax Reform: A Comparison of Three Options* (2016) <http://www.law.georgetown.edu/faculty/symposia-lectures/tax-law-public-finance/upload/Three-Fundamental-Tax-Reform-Options-Revised-Jan-25-2016.pdf> [<http://perma.cc/LL4Z-KC37>]; MICHAEL GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR AND COMPETITIVE TAX PLAN FOR THE UNITED STATES (2007); Reuven Avi-Yonah, *From Income to Consumption Tax: Some International Implications*, 33 SAN DIEGO L. REV. 1329 (1996).

hybrid regime while also reducing the corporate tax rate. However, for purposes of understanding my proposal, and the current tax environment surrounding discussions of international tax reform, it is important to comprehend the ideology underlying Current Worldwide Taxation and sole territorial taxation⁸¹, as well as the distinguishing characteristics of each system and the systems in between.

A. Ending Deferral: Current Worldwide Taxation

The proposal to end deferral and adopt Current Worldwide Taxation has been raised several times by policy makers⁸² and scholars.⁸³ The classic economic justification for such regime relies on the idea of Capital Export Neutrality (CEN). According to the principles of CEN, if the home country subjects all income to Current Worldwide Taxation, investment decisions will be made based on efficiency and profit maximization rather than tax planning. This will result in increasing world welfare.⁸⁴ Current Worldwide Taxation is also justified because the home country inevitably contributes to the production of foreign income and should therefore benefit from a proportionate share of tax revenue associated with such foreign income. Furthermore, the lack of taxation that stems from any regime that does not implement Current Worldwide Taxation risks the internal source tax base of the United States. Finally, despite arguments to the contrary made by those who oppose Current Worldwide Taxation, it will not put the U.S. multinationals at a competitive disadvantage, as long as the rate is appropriate.⁸⁵ In fact,

⁸¹ See, e.g. Klaus Vogel, *Worldwide vs. Source Taxation Of Income – A Review and Re-Evaluation of Arguments*, 8 INTERTAX 216, 216-229 (1988); Paul Mcdaniel, *Territorial vs. Worldwide International Tax Systems, Which is Better for the U.S.?*, 8 FLA. TAX REV. 283 (2006-2008); Adam Rozenzweig, *Source as a Solution to Residence*, 17(6) FLA. TAX REV. 471 (2015) (who tries to mitigate the contradiction between source and residence and proposes a new legal and doctrinal approach to international tax by using the source rules to define the residency of an entity for tax purposes).

⁸² President Kennedy Administration proposal in 1961 (Federal Tax System - Message from the President of the United States, 107 Cong. Rec. 6456, 6458 (1961)); Press Release, Sen. Wyden & Sen. Coats, The Bipartisan Tax Fairness and Simplification Act of 2011, <http://www.wyden.senate.gov/imo/media/doc/Wyden-Coats%20Two%20Pager%20FINAL1.pdf> [<http://perma.cc/BY48-9467>] (requiring that a U.S. shareholder include as a deemed dividend its share of the current foreign earnings of CFC's and the distinction between Subpart F income and non-Subpart F income is eliminated and proposing legislation that provides several specific provisions to address potentially abusive transactions).

⁸³ See Robert J. Peroni, J. Clifton Fleming, Jr. & Stephen E. Shay, *Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455 (1999). (I agree that ending deferral is justified but it does not seem feasible and all attempts to end deferral had failed so far).

⁸⁴ See PEGGY B. MUSGRAVE, U.S. TAXATION OF FOREIGN INVESTMENT INCOME: ISSUES & ARGUMENTS (1969).

⁸⁵ See Reuven S. Avi-Yonah & Nicola Sartori, *Sys. On Int'l Taxation & Competitiveness: Foreword*, 65 TAX L. REV. 313 (2012); Michael S. Knoll, *The Connection Between Competitiveness and International Taxation*, 65 TAX L. REV. 349 (2012); Jane G. Gravelle, *Does the Concept of Competitiveness Have Meaning in Formulating Corp. Tax Pol'y?*, 65 TAX L. REV. 323 (2012); Reuven S. Avi-Yonah & Yaron Lahav, *The Effective Tax Rates of the Largest U.S. and EU Multinationals*, 65 TAX L. REV. 375 (2012); Brian J. Arnold, *A Comp. Persp. on the U.S. Controlled Foreign Corp. Rules*, 65 TAX L. REV. 473 (2012); Eric Toder, *Int'l Competitiveness: Who Competes Against Whom and for What?*, 65 TAX L. REV. 505 (2012); Melissa Costa & Jennifer Gravelle, *Taxing Multinational Corps: Average Tax Rates*, 65 TAX L. REV. 391 (2012); Kimberly A. Clausing, *In Search of Corp. Tax Incidence*, 65 TAX L. REV. 433 (2012); Kevin S. Markle & Douglas A. Shackelford, *Cross-Country Comparisons of the Effects of Leverage, Intangible Assets, and Tax Havens on Corp. Income Taxes*, 65 TAX L. REV. 415 (2012); Bret Wells & Cym Lowell, *Tax Base Erosion and Homeless Income: Collection at Source Is the Linchpin*, 65 TAX L. REV. 535 (2012).

Current Worldwide Taxation is required to achieve fairness in the comprehensive taxation system of any country.⁸⁶

In my opinion, Current Worldwide Taxation would likely reduce the lock-out effect, as it will minimize the incentive to keep profits outside of the U.S. However, although current worldwide taxation might reduce the opportunities of international tax arbitrage, it is unlikely that ending deferral will reduce *all* tax avoidance incentives or schemes. Most tax avoidance schemes rely heavily on the fact that many non-U.S. jurisdictions adopt beneficial, low-or-nonexistent tax regimes. Therefore, as long as these tax haven regimes continue to exist, international tax avoidance will continue even after ending deferral. In fact, current worldwide taxation will likely *increase* the incentive to invert in order to benefit from these tax havens and avoid worldwide taxation.

B. Ending Worldwide Taxation: Sole Territorial Taxation

In recent years, several prominent scholars and policy makers have proposed ending U.S. worldwide taxation and adopting sole territorial taxation.⁸⁷ In this system, foreign income of U.S. corporations and their subsidiaries, together with the dividend income received from them, are fully exempted from U.S. taxation and subject to taxation only by the foreign source country according to its laws. The economic justification for the exemption relies on the criteria of Capital Import Neutrality (CIN) and Capital Ownership Neutrality (CON). According to the standard of CON: “world welfare is maximized if the identities of capital owners are unaffected by tax rate differences”.⁸⁸ The usual policy recommendation to achieve CON is for countries to adopt territorial tax systems.⁸⁹

Supporters of territorial taxation argue that as a result of U.S. worldwide taxation, U.S. multinationals likely face a higher tax burden on foreign investments than multinationals based in other OECD jurisdictions, which leads to the weakening of U.S.

⁸⁶ See J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299 (2001); Nancy H. Kaufman, *Fairness and the Taxation of Int'l Income*, 29 L. & POL'Y IN INT'L BUS. 145 (1998); Ruth Mason & Michael Knoll, *What is Tax Discrimination?*, 121 YALE L.J. 1014 (2012); Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination: Still Stuck in the Labyrinth of Impossibility*, 121 YALE L.J. 1118 (2012).

⁸⁷ See HARRY GRUBERT & JOHN MUTTI, TAXING INTERNATIONAL BUSINESS INCOME: DIVIDEND EXEMPTION VERSUS THE CURRENT SYSTEM 67 (2001); President's Advisory Panel On Tax Reform, *Simple, Fair, & Pro-Growth: Proposals to Fix America's Tax System* 239-244 (1985); NAT'L COMM. ON FISCAL RESP. & REFORM, THE MOMENT OF TRUTH (2010); S. 2091, 112th Cong. (2d Sess. 2012) (proposing a participation exemption system under which a deduction is permitted for 95% of the qualified foreign-source portion of dividends a domestic corporation receives from its CFCs); *Baucus Unveils Proposals for Int'l Tax Reform*, S. COMM. ON FIN., (Nov. 19, 2013), <http://www.finance.senate.gov/newsroom/chairman/release/?id=f946a9f3-d296-42ad-bae4-bcf451b34b14> [<http://perma.cc/S8QK-DP3Z>] (proposing a dividend exemption system by means of a 100% deduction for the foreign-source portion of dividends received from CFCs by domestic corporations that are 10% U.S. shareholders of those CFCs and that have satisfied a one year holding period requirement).

⁸⁸ See Mihir Desai & James R. Hines Jr., *Evaluating Int'l Tax Reform*, 56(3) NAT'L TAX J. 487, 488 (2003); See also Mihir A. Desai & James R. Hines Jr., *Old Rules and New Realities: Corporate Tax Policy in a Global Setting*, 57 NAT'L TAX J. 937 (2004).

⁸⁹ See Mihir A. Desai, *New Foundations for Taxing Multinational Corps.*, 82 TAXES 39, 48 (2004).

multinationals' competitive position and lost investment opportunities. Proponents argue that sole territorial taxation is needed to protect the competitiveness of U.S. multinationals in international markets as most other developed countries, such as Japan and the UK, have successfully adopted sole territorial regimes.⁹⁰

No doubt that sole territorial taxation has a lot of merits. This regime would reduce the lock-out effect since U.S. multinationals could repatriate their foreign sourced income without triggering a taxable realization event. Their decisions on repatriations and investments would be made according to economic considerations. In addition, territorial taxation would reduce the incentives for inversions and keep corporations in the United States legally and economically. However, I am more convinced by the arguments made by opponents of such a regime.⁹¹ The data really proves that U.S. multinationals do not suffer any competitiveness disadvantage from worldwide taxation. Exempting their foreign income would just reduce their U.S. tax bill (on foreign income) to zero and would probably also reduce their U.S. tax bill on their U.S. income, as they would aggressively shift more profits abroad. This increased profit shifting would pose a serious risk to the U.S. tax base, a problem many jurisdictions that use a sole territorial regime currently face, as indicated by the OECD BEPS project.

Therefore, implementing sole territorial taxation will not solve the challenge of international corporate tax avoidance. Rather, it will simply change the leading methods of avoidance from lock out and inversions to profit shifting. Thus, I do not believe that sole territorial taxation is the appropriate response to the challenge of international corporate tax avoidance. In addition, it does not seem that such a regime is politically feasible in the United States despite the Republican support of territoriality. In any case, even in sole territorial taxation, an additional and separate norm or rule is essential to protect the tax base and limit avoidance. I argue that my proposed norm of a Minimum Global Effective Corporate Tax Rate would be appropriate and useful both in a sole territorial tax regime and in a worldwide taxation regime.

C. In Between Worldwide & Territorial Taxation

As the debate between worldwide and territorial taxation continues, it seems that a compromise between the two regimes is more likely than one being selected over the

⁹⁰ See Philip Dittmer, A Global Perspective on Territorial Taxation, TAX FOUND. (2012), <http://taxfoundation.org/article/global-perspective-territorial-taxation> [<http://perma.cc/M5WT-UYZF>].

⁹¹ See Letter from 24 International Tax Experts to Congress (Sept. 25, 2015), <http://americansfortaxfairness.org/files/24-International-Tax-Experts-Letter-to-Congress-9-25-15-FINAL-for-printing.pdf> [<http://perma.cc/C8JQ-JA4S>] (addressing current tax reform efforts in Congress).

other.⁹² In his recent book, Shaviro argues that neither territorial taxation nor worldwide taxation addresses the fundamental problems at hand.⁹³ Instead, Shaviro supports a “unilateral national welfare perspective” and proceeds to propose that the U.S. enact a worldwide system in which foreign taxes are only deductible, rather than credited as they are currently.⁹⁴

This proposal would definitely change the outcomes of the regime substantially but it would not change the realities of international corporate tax avoidance. As Professor Avi-Yonah argues because of the U.S.’s prominent and influential role within the global economy, a policy that replaces the foreign tax credit with a deduction could be very harmful. Professor Avi-Yonah, and others, have advocated for a profit split regime that allocates the profits of multinationals through a formula that mainly accounts for, or focuses on, the place and volume of sales.⁹⁵ Recently, the EU called for implementation of formulaic apportionment in a renewed proposal to adopt a Common Consolidated Corporate Tax (CCCT).⁹⁶

Formulaic apportionment has a lot of merits and supporters but has also been subject to considerable criticism and rejection.⁹⁷ I do not believe that the U.S. will adopt such a system or that the international community could design and agree upon a formula in order to adopt such a regime. Based on this reality, I assume that countries will continue to adopt different rules, including the leading arm’s length principle in variety of versions, with limited coordination, and as a result international tax avoidance will continue. Hence, it is necessary to design *separate* and unilateral rules to balance

⁹² I categorize two policy makers proposals in this mid category: option Z of Former Chairman Baucus’s Staff Discussion Drafts for International Tax Reform (<http://www.finance.senate.gov/newsroom/chairman/release/?id=f946a9f3-d296-42ad-bae4-bcf451b34b14>) [<http://perma.cc/RMQ7-QGXZ>] which in a complex technique would either tax on a current basis CFC income from products and services sold into foreign markets at 80% of the U.S. corporate tax rate with full foreign tax credits, or currently tax at the full rate only 60% of such active income. A reduced tax rate, payable over eight years would also be imposed on un-repatriated CFC earning from periods before the effective date of the proposal. The second policy maker proposal in this category, is the proposal made by Chairman Camp’s Tax Reform Act of 2014 (http://waysandmeans.house.gov/UploadedFiles/Statutory_Text_Tax_Reform_Act_of_2014_Discussion_Draft_022614.pdf) [<http://perma.cc/8GTM-7YVA>]. This act establishes a participation exemption system for foreign income. This exemption is effectuated by means of a 95% deduction for the foreign-source portion of dividends received from certain foreign corporations (“specified 10% owned foreign corporations”) by domestic corporations. But, additionally, in complex technique that stems from the intention to prevent tax avoidance, it results in imposing around 15% U.S. tax on foreign income from the exploitation of intangible property.

⁹³ See SHAVIRO, *supra* note 79.

⁹⁴ See Daniel N. Shaviro, *Splitting the Baby: An Intermediate Tax Rate for Repatriations of Foreign Source Active Bus. Income?* Proceedings. 95 Annual Conference on Taxation and Minutes of the Annual Meeting of the National Tax Association, 294 (2002) (raising the idea of an intermediate tax rate for repatriations of foreign source active business income for debate and consideration).

⁹⁵ See Reuven S. Avi-Yonah, Kimberly A. Clausing & Michael C. Durst, *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 FLA. TAX REV. 497 (2009); Reuven R. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 TEX. L. REV. 1301 (1996); Reuven S. Avi-Yonah, *The Rise and Fall of Arm’s Length: A Study in the Evolution of U.S. Int’l Taxation*, 15 VA. TAX REV. 89 (1995); Reuven S. Avi-Yonah, *Territoriality: For and Against*, U. MICH. PUB. L. RES., Paper No. 29 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256580.

⁹⁶ See *Fact Sheet, Questions & Answers on the CCCTB Re-launch*, EUR. COMMISSION (Jun. 2015), http://europa.eu/rapid/press-release_MEMO-15-5174_en.htm [<http://perma.cc/DWC9-7KJD>].

⁹⁷ See Julie Roin, *Can the Income Tax Be Saved? The Promises and Pitfalls of Adopting Worldwide Formulary Apportionment*, 61 TAX L. REV. 169, 172–73 (2008).

targeting international tax avoidance with the need to respect the variety of international tax regimes and each country's tax sovereignty.

D. Minimum Taxation

“America’s system of business taxation is in need of reform” is the opening statement of Former President Obama’s framework for business tax reform from 2012. The framework aims to support the competitiveness of American businesses and to increase incentives to invest and hire in the United States by lowering the corporate tax rate from 35% to 28%, cutting tax expenditures, and reducing complexity, while being fiscally responsible.⁹⁸ The framework rejects the proposal of sole territorial system because it will give corporations greater incentives to shift profits and because such system could “exacerbate the continuing race to the bottom in international tax rates”.⁹⁹ Instead, the framework requires companies to pay a minimum tax on overseas profits. According to this proposal, “foreign income deferred in a low-tax jurisdiction would be subject to immediate U.S. taxation up to the minimum tax rate with a foreign tax credit allowed for income taxes on that income paid to the host country. This minimum tax would be designed to balance the need to stop rewarding tax havens and to prevent a race to the bottom with the goal of keeping U.S. companies on a level playing field with competitors when engaged in activities which, by necessity, must occur in a foreign country”.¹⁰⁰ In his budgets throughout his last term as President, including the FY 2016 budget, Former President Obama reaffirmed his 2012 framework for business tax reform with some modifications and elaborations. Among the other provisions, the budget includes a one-time, mandatory 14% tax on previously untaxed foreign income and a 19% minimum tax on future foreign income.¹⁰¹

Minimum taxation has been addressed and analyzed in the literature.¹⁰² For example, Harry Grubert and Rosanne Altshuler examine and compare several reform proposals including four different versions of a minimum tax on foreign income: (a) a country-by-country minimum tax of 15% on active income with a credit for the effective foreign rate up to the 15% threshold. Dividends from both countries would be subject to the minimum tax and those above the minimum would be fully exempt, including dividends from previously taxed income; (b) a per-country minimum tax with dividend exemption, but a current deduction against the minimum tax base for real investment in the location; (c) a minimum tax at the overall foreign level at a higher rate; and (d) an overall minimum tax with expensing of current investment against the taxable U.S. base. In their analysis, the minimum tax would be calculated using a five-year average of foreign taxes paid in relation to Earnings & Profits (E&P). The expensing under the country-by-country minimum tax (b) and under the overall minimum tax (d) is intended to make the forward looking U.S. effective tax rate on the normal return to investment zero while the forward looking effective tax rate (ETR) on the excess return bears a total tax, including both the foreign and U.S. components, of at least 15%.

⁹⁸ See WHITE HOUSE & DEP’T. OF THE TREASURY, *The President’s Framework for Business Tax Reform* (Feb. 2012).

⁹⁹ WHITE HOUSE, *supra* note 98, at 14.

¹⁰⁰ WHITE HOUSE, *supra* note 98, at 14.

¹⁰¹ See DEP’T. OF THE TREASURY, *supra* note 20.

¹⁰² See Harry Grubert & Rosanne Altshuler, *Fixing the System: An Analysis of Alternative Proposals for the Reform of Int’l Tax*, 66(3) NAT’L. TAX J. 671 (2013); Shay, *supra* note 31.

In analyzing and comparing these four proposals the authors use the following criteria: competitiveness, the impact on the lockout effect; changes in the incentives to shift income; the distortion of investment incentives and whether the reform is consistent with a more efficient allocation of worldwide capital; revenue; complexity; tax planning incentives beyond income shifting; and incentives to expatriate. They use an effective tax rate simulations methodology that shows the effect of different policies on several important behavioral margins.¹⁰³ They conclude:

Compared to the other schemes, we find that the per-country minimum tax with expensing for real investment has many advantages with respect to these margins. The per-country minimum tax offsets the increased incentives for income shifting under pure dividend exception and is better than full inclusion in tailoring companies' effective tax rates to their competitive position abroad. No U.S. tax burden will fall on companies that earn just a normal return abroad. The per-country minimum tax is basically a tax on large excess returns in low-tax locations, cases in which the company probably has less intense foreign competition . . . In addition, the overall minimum tax seems a serious alternative deserving consideration.¹⁰⁴

I am convinced that minimum taxation is the right direction. However, my philosophy and justifications for minimum taxation differ from those already mentioned, as do the details of my proposed method of implementation. In Part V, I will present my own proposal of minimum taxation and elaborate on the proposal, its philosophy and justifications, while also acknowledging counterarguments and making comparisons to other proposals for minimum taxation.

E. Limiting Corporate Inversions

The enactment of Section 7874 in 2004 was a response to the first wave of corporate inversions, after long debate in Congress and failure of non-tax measures. Section 7874 succeeded in limiting naked inversions by treating an inverted corporation as "domestic" if it is 80% owned by shareholders of the former domestic parent (hereinafter "the 80% threshold"). However, if the former shareholders own less than 60%, then the inversion falls outside the reach of Section 7874 (hereinafter "the 60% threshold").¹⁰⁵ In addition, the inversion is excluded from Section 7874 if the affiliated group of the newly inverted foreign corporation has "substantial business activities" in the foreign country.¹⁰⁶

In between these two thresholds (60%-80%), Section 7874 imposes U.S. tax on the "inversions gains" which generally refer to certain gains from transfers related to the inversion transactions. However, this section, as any other section, includes loopholes

¹⁰³ Grubert & Altshuler, *supra* note 102, at 685.

¹⁰⁴ *Id.* at 708-09.

¹⁰⁵ See Michael S. Kirsch, *The Congressional Response to Corporate Expatriations: The Tension Between Symbols and Substance in the Taxation of Multinational Corporations*, 24 VA. TAX REV. 475 (2005).

¹⁰⁶ Under recent regulations (Treas. Reg. § 1.7874-3 (2015)), this exception is met if 25% of the expanded affiliated group's employees, assets, and gross income are located in where the foreign corporation is organized.

that enable multinationals to work around the anti-inversion rule by simply avoiding the thresholds of applicability and/or fulfilling the standards necessary for exclusion.

In response, the Treasury is trying to strengthen Section 7874 and limit these avoidance strategies. In Notice 2014-52¹⁰⁷, the Treasury expressed its intention to issue regulations that: disregard certain stock of a foreign acquiring corporation that holds a significant amount of passive assets for purposes of the ownership continuity test ratio, meaning transactions with foreign corporations without active businesses are no longer possible; disregard certain non-ordinary course distributions by the U.S. company, also for purposes of the ownership continuity test ratio, meaning U.S. companies cannot attempt to shrink their size in advance of a transaction; change the treatment of certain transfers of the stock of the foreign acquiring corporation – such as in a spin-off – so that the transfers will not qualify for the Section 7874 “expanded affiliated group” exception, meaning a U.S. company will not be able to use a spin-off to effectuate a re-domiciliation.¹⁰⁸

In Notice 2015-79, the Treasury and the IRS expressed their intent to issue regulations under Section 7874 to provide that an Expanded Affiliated Group (EAG) cannot have substantial business activities in the relevant foreign country when compared to the EAG’s total business activities, unless the foreign acquiring corporation is subject to tax as a resident of the relevant foreign country, because this is the premise underlying the substantial business activities exception of Section 7874. Therefore, exploiting the exception without paying tax to the foreign country contradicts the purpose of Section 7874 and such activity should be curtailed. In addition, Notice 2015-79 provides that in certain cases when the foreign parent is a tax resident of a third country, stock of the foreign parent issued to the shareholders of the existing foreign corporation is disregarded for purposes of the ownership requirement, thereby raising the ownership attributable to the shareholders of the U.S. entity, possibly above the 80% threshold.¹⁰⁹

In addition to strengthening the current rules and thresholds, scholars supported substantial changes to handle corporate inversions. I totally agree with Shaviro who supported the enactment of an “exit tax” that “could be based on the amount of U.S. tax that the company would have paid had it repatriated all of its earnings just before the change in legal status occurred.”¹¹⁰ Recently, Avi-Yonah and Marian expressed their support of the exit tax. Although their preferred solution would be to change corporate tax residency rules, they acknowledge that it is not politically feasible and therefore they state that the exit tax would be a second best solution for the issue of corporate

¹⁰⁷ I.R.S. Notice 2014-52, 2014-42 I.R.B. 712.

¹⁰⁸ For further discussion of these regulations, see Reuven S. Avi-Yonah, *A World Turned Upside Down: Reflections on the ‘New Wave’ Inversions and Notice 2014-52*, U. MICH. PUB. L. & LEGAL RES. Paper Series 421 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2502513h [<http://perma.cc/B794-UDRN>].

¹⁰⁹ I.R.S. Notice 2015-79, 2015-49 I.R.B. 775; see Cathy Hwang, *The New Corporate Migration Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807 (2015) (discussing the motives behind inversions, the treasury responses and further policy considerations); Edward Kleinbard, “Competitiveness” Has Nothing to Do with It, 144 *Tax Notes* 1055 (2014); Scott A. Hodge, *IRS Data Contradicts Kleinbard’s Warnings of Earnings Stripping from Inversions*, THE TAX FOUND. (Sept. 2, 2014), <http://taxfoundation.org/blog/irs-data-contradicts-kleinbard-s-warnings-earnings-stripping-inversions> [<http://perma.cc/FU5P-6BMA>].

¹¹⁰ See Daniel Shaviro, *Understanding and responding to corporate inversions*, START MAKING SENSE (July 28, 2014), <http://danshaviro.blogspot.com/2014/07/understanding-and-responding-to.html> [<http://perma.cc/H353-W4MA>].

inversion.¹¹¹ In a special and unique contribution to the tax debate on corporate inversions, and its interactions with corporate law,¹¹² Eric Talley supported bundling tax law and corporate governance.¹¹³ In my opinion, the most effective and appropriate measure to limit corporate inversions is the “exit tax.”

F. Modifying the U.S. Bilateral Tax Treaty Law

The United States is also responding to the issue of international corporate tax avoidance by changing its bilateral tax treaty law as well. Recently, following the publication of draft updates,¹¹⁴ the treasury published a new 2016 U.S. Model Income Tax Convention.¹¹⁵ The new convention includes a “Subsequent Changes in Law” article, which denies treaty benefits “if at any time after the signing of this Convention, the general rate of company tax applicable in either Contracting State falls below 15% with respect to substantially all of the income of resident companies, or either Contracting State provides an exemption from taxation to resident companies for substantially all foreign source income.” The 2016 convention addresses a “special tax regime,” which is broadly defined to include almost every regime that provides a preferential effective rate of taxation. The operative outcome of the special tax regime, according to the proposal, is the denial of treaty benefits to items of income (Interest (Article 11), Royalties (Article 12) and Other Income (Article 21)) if the resident of the other contracting state (the residence state) beneficially owning the interest, royalties or other income, is related to the payer of such income, and benefits from a special tax regime in its residence state with respect to the particular category of income. The Treasury emphasizes that “the application of the term ‘special tax regime’ in Articles 11, 12 and 21 is consistent with the tax policy considerations that are relevant to the decision to enter into a tax treaty, or to amend an existing tax treaty, as articulated by the Commentary to the OECD Model, as amended by the Base Erosion and Profits Shifting initiative.”¹¹⁶

¹¹¹ See Reuven S. Avi-Yonah & Omri Marian, *Inversions and Competitiveness: Reflections in the Wake of Pfizer/Allergan*, U. MICH. PUB. L. & LEGAL RES. PAPER SERIES, 488 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2703576 [<http://perma.cc/5PCA-ELEP>].

¹¹² See Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229 (2008).

¹¹³ See Eric L. Talley, *Corporate Inversions and the Unbundling of Regulatory Competition*, 101 VA. L. REV. 1649 (2015).

¹¹⁴ DEP’T. OF THE TREASURY, *New Article 28: Subsequent Changes in Law* (May 20, 2015), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Subsequent-Changes-in-Law-5-20-2015.pdf> [<http://perma.cc/SVJ4-QJVS>]; DEP’T. OF THE TREASURY, *New Article 3 Paragraph 1(I) Definition of special tax regime*, <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-Special-Tax-Regimes-5-20-2015.pdf> [<http://perma.cc/Y6SL-6KDU>]; Press Release, DEP’T. OF THE TREASURY, Treasury Releases Select Draft Provisions for Next U.S. Model Income Tax Treaty (May 20, 2015), <http://www.treasury.gov/press-center/press-releases/Pages/jl10057.aspx> [<http://perma.cc/2FYL-M4ZG>].

¹¹⁵ DEP’T. OF THE TREASURY, *Resource Center: Treaties and TIEAs*, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/treaties.aspx> [<http://perma.cc/C4LX-3Q8B>]; DEP’T. OF THE TREASURY, *United States Model Income Tax Convention* (Feb. 17, 2016), <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US-Model-2016.pdf> [<http://perma.cc/PL9L-K7NK>].

¹¹⁶ *New Article 3 Paragraph 1(I) Definition of special tax regime*, *supra* note 114, at 2.

These treaty-based specific anti-avoidance rules to limit international corporate tax avoidance, impose U.S. tax liabilities on foreign entities by unilaterally changing existing treaties. I do not think that this is appropriate. Changes to treaties should be made through negotiations between the treaty partners and not unilaterally. However, the U.S. of course has full authority to determine the tax outcomes of U.S. multinationals and their worldwide income. Still, that is not enough in the current global digital economy. The U.S. should interact with the changes in the international tax arena, particularly with the OECD BEPS project.¹¹⁷

IV. THE G20/OECD INTERNATIONAL RESPONSE IN THE BEPS PROJECT

The starting point of the G20/OECD BEPS Action Plan¹¹⁸ is that globalization has opened up opportunities for MNEs to minimize their tax burden, harming governments, individuals and businesses.¹¹⁹ The Action Plan states that taxation is at the core of countries' sovereignty, but also acknowledges that in some cases the interaction between differing domestic tax rules leads to gaps and frictions. The international standards and international collaborative efforts have sought to address these frictions in a way that respects tax sovereignty, but the remaining gaps continue to weaken the system's efficacy. These weaknesses put the existing consensus based framework at risk, and a bold move by policy makers is necessary to prevent worsening problems. Therefore, the OECD BEPS Action Plan concludes that fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it. New international standards must be designed to ensure the coherence of corporate income taxation at the international level. "A realignment of taxation and relevant substance is needed to restore the intended effects and benefits of international standards, which may not have kept pace with changing business models and technological developments."¹²⁰

On October 5, 2015, after almost three years of extensive work (including publishing drafts and deliverables¹²¹ and wide discussions, consultation and public

¹¹⁷ Deputy Assistant Secretary for International Tax Affairs Robert B. Stack, said upon publication of the proposed changes to the U.S. Model Income Tax Treaty: "The draft provisions we are releasing for comment today reflect the fact that the tax regimes of our treaty partners are more likely to change over time than they have in the past, and that they sometimes change in ways that encourage base erosion and profit shifting or BEPS, by multinational firms. Treaties exist to eliminate double taxation, not to create opportunities for BEPS, and today's updates fully take account of the new international tax environment. The draft provisions also articulate steps that would help prevent our treaty network from encouraging inversion transactions." Press Release, *supra* note 114.

¹¹⁸ OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), http://www.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en [<http://perma.cc/H9Q7-FWTB>]. For further discussions of the Action Plan, see Hugh J. Ault, Wolfgang Schon, & Stephen E. Shay, *Base Erosion and Profit Shifting: A Roadmap for Reform*, 68 BULL. INT'L TAX. 275 (2014).

¹¹⁹ *Action Plan*, *supra* note 118, at 8.

¹²⁰ *Action Plan*, *supra* note 118, at 13.

¹²¹ OECD, *BEPS 2014 Deliverables*, <http://www.oecd.org/ctp/beps-2014-deliverables.htm> [<http://perma.cc/U9D4-NNQA>].

participation) the OECD published the final reports on all fifteen actions.¹²² These reports propose tax norms on all fifteen actions to be adopted into domestic tax laws, bilateral tax treaties and a hybrid multilateral instrument. The proposed norms can be roughly organized in taxonomy of three classifications:

First, General Anti-Avoidance Rule: Action 6 introduces a general anti-avoidance rule to prevent abuses of bilateral tax treaties. According to this rule, in Article X Paragraph 7:

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.¹²³

I clearly support the General Anti-Avoidance Rule, but my difficulty with the proposed rule is that the standard it uses is based on “purpose” and this test, as the domestic experience teaches us, necessitates a problematic level of administrative discretion and costly litigation.¹²⁴

Second, Specific Anti-Avoidance Rules: These rules are the core of the OECD proposals as they target specific and common channels used to avoid taxation. For example, Action 1 considers the addition of “significant digital presence” as a nexus to establish source taxation in a global digital economy.¹²⁵ Action 2 develops several specific anti-avoidance rules for domestic law to neutralize the effect of hybrid mismatch arrangements and includes changes to the OECD Model Tax Convention to address such

¹²² The Action Plan included 15 Actions as follows: (1) Address the tax challenges of the digital economy; (2) Neutralize the effects of hybrid mismatch arrangements; (3) Strengthen CFC rules; (4) Limit base erosion via interest deductions and other financial payments; (5) Counter harmful tax practices more effectively, taking into account transparency and substance; (6) Prevent treaty abuse; (7) Prevent the artificial avoidance of PE status; (8,9,10) Assure that the transfer pricing outcomes are in line with value creation; (11) Establish methodologies to collect and analyze data on BEPS and the actions to address it; (12) Require taxpayers to disclose their aggressive tax planning arrangements; (13) Re-examine transfer pricing documentation; (14) Make dispute resolution mechanisms more effective; (15) Develop a multilateral instrument. *Action Plan supra* note 121 at 14-24.

¹²³ *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances*, OECD Publishing (2014), at 66.

¹²⁴ See *HM Revenue & Customs v. Mayes* [2011] EWCA (Civ) 407; *Macniven v. Westmoreland Invs. Ltd.* [2001] UKHL 6.; *W.T. Ramsay Ltd v. Inland Revenue Comm’rs.* [1982] STC 174.; Antony Seely, *Tax avoidance: a General Anti-Abuse Rule*, House of Commons Library, Briefing Paper Number 06265, at 27-33 (2016), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06265> [<http://perma.cc/H88T-FPUC>].

¹²⁵ *Addressing the Tax Challenges of the Digital Economy*, OECD Publishing (2014), <http://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm> [<http://perma.cc/KBV2-B5VB>]. For further discussion of e-commerce taxation, see Rifat Azam, *Global Taxation of Cross-Border E-Commerce Income*, 31 VA. TAX REV. 639 (2012); Rifat Azam, *E-Commerce Taxation and Cyberspace Law: The Integrative Adaptation Model*, 12(5) VA. J.L. & TECH. 1 (2007); Reuven Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507 (1996-1997); Orly Mazur, *Taxing the Cloud*, 103 CAL. L. REV. 1 (2015).

arrangements.¹²⁶ Action 3 considers many options for the design of CFC rules that would prevent BEPS and puts forth some recommendations on the “building blocks” that are necessary for effective CFC rules.¹²⁷ In Action 4, the OECD proposes to set general interest limitation rules which limit interest deductibility either by fixed ratio or group ratio, as already used or experienced by some countries.¹²⁸

Third, Disclosure and Transparency Rules: The OECD uses disclosure and transparency as an important regulatory tool in coping with BEPS. Action 12 provides a modular framework that enables countries without mandatory disclosure rules to design a regime that fits their need to obtain early information on potentially aggressive or abusive tax planning schemes and their users.¹²⁹ The country-by-country reporting under Action 13 is a new regime that imposes a duty on multinationals to report annually, and for each jurisdiction in which they do business, the amount of revenue, profit before income tax, and income tax paid and accrued. Multinationals are also required to report their total employment, capital, retained earnings, and tangible assets in each tax jurisdiction and to describe the structure and business activities of each entity in the jurisdiction. The OECD report includes a model template¹³⁰ for the country-by-country report.¹³¹

¹²⁶ *Neutralising the Effects of Hybrid Mismatch Arrangements*, OECD Publishing (2014), <http://www.oecd.org/tax/neutralising-the-effects-of-hybrid-mismatch-arrangements-action-2-2015-final-report-9789264241138-en.htm> [<http://perma.cc/9PPG-A8XR>].

¹²⁷ *Designing Effective Controlled Foreign Company Rules, Action 3 - 2015 Final Report*, OECD Publishing, Paris (2015), <http://www.oecd.org/tax/designing-effective-controlled-foreign-company-rules-action-3-2015-final-report-9789264241152-en.htm> [<http://perma.cc/CJ5Y-GEXF>].

¹²⁸ *Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 - 2015 Final Report*, OECD Publishing, Paris (2015), <http://www.oecd.org/tax/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2015-final-report-9789264241176-en.htm> [<http://perma.cc/9JZV-HV47>].

¹²⁹ *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD Publishing, Paris (2015), <http://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm> [<http://perma.cc/T6ZL-HNHS>].

¹³⁰ *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD Publishing, Paris (2015), <http://www.oecd.org/tax/transfer-pricing-documentation-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm> [<http://perma.cc/A8S4-JEPW>]. On January 27, 2016 thirty-one nations signed the agreement to enable automatic sharing of country-by-country information. See *A boost to transparency in international tax matters: 31 countries sign tax co-operation agreement to enable automatic sharing of country by country information*, OECD (Jan. 27, 2016), <http://www.oecd.org/tax/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm> [<http://perma.cc/6GES-GBG3>].

¹³¹ The U.S. already incorporates disclosure and transparency in its tax avoidance efforts as seen in its mandatory disclosure regime and recent enactment of FATCA in 2010. See *Foreign Account Tax Compliance Act (FATCA)*, DEP'T. OF THE TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> [<http://perma.cc/4JXP-DE3Q>]; Eric J. Snyder, *FATCA and the broader tax crackdown*, 21 (6) TRUSTS & TRUSTEES 596 (2015), <http://tandt.oxfordjournals.org.ezproxy.cul.columbia.edu/content/21/6/596.full> [<http://perma.cc/C7NA-F2LX>]; Joshua D. Blank & Ruth Mason, *Exporting FATCA* (N.Y.U. CTR. FOR L., ECON & ORG., Working Paper No. 14-05, 2015) <http://ssrn.com/abstract=2389500> [<http://perma.cc/ZRE2-LBE6>]. The U.S. disclosure and transparency rules are among the most developed in the world and have had substantial global influence. I have several insights and contributions concerning disclosure and transparency as anti-avoidance measures but will leave that for another opportunity.

The prospects of the BEPS project are complex.¹³² Some proposals are progressing and are expected to be widely accepted and implemented such as the proposals on country-by-country reporting and the proposals on transparency and information exchange to handle individual tax evasion and the proposals on Mutual Agreement Procedures (MAP) to solve treaty disputes in timely manner. Amendments to the OECD Model Treaty and to the OECD transfer pricing guidelines are expected to be implemented at the OECD soft law level and they will probably have some indirect impact on bilateral treaty law and case law. Beyond these particular proposals, I do not expect further effective implementation or that the G20/OECD BEPS project will substantially impact the international tax regime. The main challenges of tax competition and corporate tax avoidance are therefore likely to continue to prevail and will require different solutions. One of these solutions is unilateral solution by the United States.

The United States participated in the OECD BEPS Project and influenced the project and its outcomes. Furthermore, as one of the major players in the field of international tax and leaders of the global economy, the U.S. publicly supported the project in several political announcements.¹³³ But, as Gary Hufbauer and others have argued, the proposals “would be detrimental to the United States, though some are harmless and a few are actually useful”.¹³⁴ I agree with Shaviro who argued that the OECD-BEPS project is perceived as “anti-U.S. companies” and would be opposed by both Republicans and Democrats, and that large amount of money will be deployed as needed in support of this opposition. According to Shaviro, the United States will

¹³² See Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS*, HARV. BUS. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716125 [<http://perma.cc/M24R-5WFP>]; Reuven S. Avi-Yonah, *Full Circle? The Single Tax Principle, BEPS, and the New US Model* (MICH. PUB. L. & LEGAL RES. PAPER SERIES, Paper No. 480, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673463 [<http://perma.cc/L6HZ-X9XS>]; Itai Grinberg, *Breaking BEPS: The New International Tax Diplomacy* (GEO. L. Working Paper, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652894 [<http://perma.cc/QK7B-THWD>]; Eva Eberhartinger & Matthias Petutschnig, *Practicing Experts' Views on BEPS: A Critical Analysis*, WU INT'L TAX'N RES. PAPER SERIES, 27 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683552 [<http://perma.cc/H5JJ-GSKB>]; The BEPS Monitoring Group, *Overall Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project*, <http://bepsmonitoringgroup.files.wordpress.com/2015/10/general-evaluation.pdf> [<http://perma.cc/D4V6-JEYE>]; ZUCMAN, *supra* note 9, at 5-6 (2015); Michael Devereux & John Vella, *Are we Heading towards a Corporate Tax System Fit for the 21st Century?* 35(4) FISCAL STUD. 449-75 (2014).

¹³³ Former President Obama, for example, signed the G-7 Leaders Declaration (Schloss Elmau, Germany) from June 8, 2015 which declares that “We are committed to achieving a fair and modern international tax system which is essential to fairness and prosperity for all. We therefore reaffirm our commitment to finalize concrete and feasible recommendations for the G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan by the end of this year. Going forward, it will be crucial to ensure its effective implementation, and we encourage the G20 and the OECD to establish a targeted monitoring process to that end. We commit to strongly promoting automatic exchange of information on cross-border tax rulings. Moreover, we look forward to the rapid implementation of the new single global standard for automatic exchange of information by the end of 2017 or 2018, including by all financial centres subject to completing necessary legislative procedures. We also urge jurisdictions that have not yet, or not adequately, implemented the international standard for the exchange of information on request to do so expeditiously.” G-7 Leaders’ Declaration, G-7 (Jun. 8, 2015), <http://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration> [<http://perma.cc/3C9S-CRXX>].

¹³⁴ See Gary Hufbauer *et al.*, *The OECD’s “Action Plan” to Raise Taxes on Multinational Corporations*, PETERSON INST. FOR INT’L ECON., Working Paper No. 15-14 (Sept. 2015), <http://piie.com/publications/wp/wp15-14.pdf> [<http://perma.cc/PM78-E8BM>].

continue in its tax reform efforts at its own pace and with its own method, and “whatever happens to our rules depends on our own internal processes and debates”.¹³⁵

I believe that the United States cannot ignore these proposals as they indicate significant changes within the international environment. These proposals will influence other countries to some extent and will certainly influence American multinationals in their global business activity. The United States is taking and should continue to take the new international environment into consideration while designing its domestic tax law and its bilateral tax treaty law on international transactions. However, in addition to taking these international changes and proposals into account, I call on the U.S. to step up and play a much more influential role in the international arena.

In my opinion, the United States is the most powerful and influential country in the international tax arena. I do not agree with Itai Grinberg and Joost Pauwelyn who argued that “in most other fields, non-cooperation by the United States would be fatal. Not so in international tax, where the bargaining power of the U.S. is relatively weak and multilateral discussions without U.S. support can constrain U.S. national interests”.¹³⁶ The bargaining power of the United States in international tax law is very strong. The unilateral influence of the United States is called by Robert Kudrle, “vertical diffusion: from the practices of a single state to the international system via the OECD”.¹³⁷ Namely, that the unilateral practices of the United States turn into international law via the OECD. Similarly, Reuven Avi-Yonah, called this influence, “Constructive Unilateralism,” in the sense of unilateral actions by the United States that turn into international law in constructive manner. In the same line of thinking, I argue that the unilateral action by the United States is one important way to handle international corporate tax avoidance, and therefore, I propose unilateral domestic U.S. general anti-avoidance rule to combat corporate tax avoidance.

V. THE PROPOSED MINIMUM GLOBAL EFFECTIVE CORPORATE TAX RATE AS GENERAL ANTI-AVOIDANCE RULE

A. The Proposal

The starting point of my proposal is that the U.S. is interested in protecting its corporate tax base while maintaining the competitive position of U.S. multinationals. The United States will act unilaterally to protect its base and fulfill its international tax policy, while taking into account the new international environment. Although my proposal is also appropriate for territorial tax systems, my proposal assumes that the United States will continue with its use of a worldwide taxation system. Loopholes will continue to exist in any system of international taxation and multinationals will continue to use these loopholes to reduce their tax liability through an endless variety of tax

¹³⁵ Shaviro, *supra* note 27 (video available at <http://www.aei.org/events/the-oecd-base-erosion-and-profit-shifting-report-should-the-united-states-be-worried/>).

¹³⁶ See Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS)*, 19(24) ASIL INSIGHTS (2015), <http://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd%E2%80%99s-package-base-erosion-and> [<http://perma.cc/4C8W-QDJZ>].

¹³⁷ See Robert Kudrle, *The OECD and the International Tax Regime: Persistence Pays Off*, 16(3) J. OF COMP. POL'Y ANALYSIS: RES. & PRACTICE, 201-15 (2014).

planning strategies. Specific anti-avoidance rules that target these strategies will continue to play an important role in combating this behavior, but these individual rules alone are not enough to face the challenge and it would be more appropriate and effective to look at the overall global effective tax rate and target bottom lines rather than targeting individual methods of international corporate tax avoidance.

According to my proposal, the U.S. Congress would enact a new section in the Internal Revenue Code that would adopt a general anti-avoidance rule, which imposes a minimum global effective corporate tax rate on U.S. corporations. According to this proposed rule, if the global effective corporate tax rate of any U.S. multinational and its CFC's falls below 15%, the U.S. corporation will be required to close the gap and pay the IRS up until the minimum (15%) tax on its global profits as an interim liability. This system continues the current distinction between U.S. sourced income and foreign sourced income. U.S. source income will continue to be fully taxed by the United States and foreign source income of U.S. corporations will also continue to be fully and currently taxed according to the usual rules. As to foreign source income of U.S. CFC's, as long as it bears below 15% global effective corporate tax rate, then it will be taxed immediately up until the minimum by the United States.

Several measures have been used to define effective tax rate in the literature.¹³⁸ These measures were categorized into six types: First, Average Effective Corporate Tax Rate, defined as the observed corporate taxes divided by correctly measured corporate income. Second, Average Effective Total Tax Rate which is defined as the observed corporate taxes plus property taxes plus personal taxes on interest and dividends, divided by total capital income. Third, Marginal Effective Tax Wedge, defined as the expected real pre tax rate of return on a marginal investment, minus the after-tax return to the corporation. Fourth, Marginal Effective Corporate Tax Rate, defined as the marginal effective corporate tax wedge divided by the pre-tax return (tax-inclusive rate) or by the corporation's post tax return (tax exclusive rate). Fifth, Marginal Effective Total Tax Wedge, defined as the expected real pre-tax rate of return on a marginal investment, minus the real after tax return to the saver who provides the finance. Sixth, Marginal Effective Total Tax Rate, which is defined as the marginal effective total tax wedge divided by the pre-tax return (tax inclusive rate) or by the saver's post tax return (tax exclusive rate).¹³⁹

For purposes of my proposal, I use a measurement of an Average Effective Corporate Tax Rate, not a marginal one. This is because Average Effective Corporate Tax Rate is more relevant to assuming tax avoidance than Marginal Effective Corporate Tax Rate that is more related to decisions of the corporate itself on new investments and

¹³⁸ See, e.g., George Plesko, *An Evaluation of Alternative Measures of Corporate Tax Rates*, 35 J. OF ACCT. & ECON. 201-26 (2003); Gaetan Nicodeme (2001): *Computing Effective Corporate Tax Rates: Comparisons and Results* (Econ. Papers Working Paper Series, June 2001), <http://mpr.ub.uni-muenchen.de/3808/> [<http://perma.cc/B5WZ-3ZET>]; Don Fullerton, *The Use of Effective Tax Rates in Tax Policy*, 39(3) NAT'L TAX J. 285-92 (Sep. 1986); David Bradford & Charles Stuart, *Issues in the Measurement and Interpretation of Effective Tax Rates*, 39(3) NAT'L TAX J. 307-16 (Sep. 1986); Gillian Spooner, *Effective Tax Rates from Financial Statements*, 39(3) NAT'L TAX J. 293-306 (Sep. 1986); Boris Bitker, *Effective Tax Rates: Fact or Fancy?*, 122 U. PA. L. REV. 780-809 (1974).

¹³⁹ See Don Fullerton, *Which Effective Tax Rate?* (NBER Working Paper Series, Paper No. 1123), <http://www.nber.org/papers/w1123> [<http://perma.cc/VLB3-TCE2>].

their marginal cost and return.¹⁴⁰ Average Effective Corporate Tax Rate is also the simplest measurement and definition of effective tax rate although it has its own difficulties. One author¹⁴¹ pointed out some of these difficulties: (a) U.S. tax as a proportion of corporate income could omit foreign taxes already paid; (b) profits measured for tax purposes differ from profits measured for financial reporting; and (c) actual taxes in any year may not be related to profits in that year, due to carry forwards of previous credits or losses, and carry backs of current credits or losses. In order to mitigate this difficulty, it might be required to average over several years of taxes in the numerator and of profits in the denominator.¹⁴²

I define Global Effective Corporate Tax Rate to be the tax actually paid on foreign income of CFC's to any jurisdiction in the globe divided by the global profits as it appears in the financial reports of the CFC's (Earnings & Profit). In this definition and calculation, I use the paid tax rather than the accrued tax since I see deferral as part of the problem that shall be handled and limited by looking at the actual tax paid. This measurement is made on a global basis rather than country-by-country or entity-by-entity basis. By this definition, I overcome the mentioned criticism of omitting foreign taxes already paid, since these taxes are taken into account and integrated in my formula. This calculation is made each year for the same year and I do not recommend taking longer periods of time into account for purposes of the calculation because I prefer increased simplicity to more accuracy. I use the simple definition because I believe it achieves the proposed goal to limit international corporate tax avoidance and impose fair and effective taxation on the global income of U.S. multinationals while keeping and protecting an appropriate level of competitiveness. I choose 15% as the minimum rate because it is not too low or too high which makes it appropriate to achieve its purposes and because it has already been raised in relevant contexts. Still, I want to emphasize that other minimum rates could be adopted during the political process of legislation. This does not and should not affect the core of my proposal since the core is selecting an effective minimum—whether it is 15% or another figure—as the political/professional processes of debating and legislating yield.

This taxation presumes that a U.S. multinational that does not meet the minimum tax on the global profits of its CFCs is engaged in international corporate tax avoidance and, therefore, shall pay the minimum to the United States as the resident country of the parent corporation. However, this tax liability is an *interim* liability that intends to limit international corporate tax avoidance. Therefore, although no tax credit is given for foreign taxes paid at the current taxation point, such taxes are taken into account in the formula for purposes of calculating whether the corporation has reached the minimum corporate tax required, and, if not, the corporation is required only to add and pay *up to* the minimum rather than having to pay the full minimum of 15% *in addition to* current foreign taxes. Upon determination of the final tax liability, the foreign tax credit will be given as well as a credit for the minimum tax paid as an interim liability.

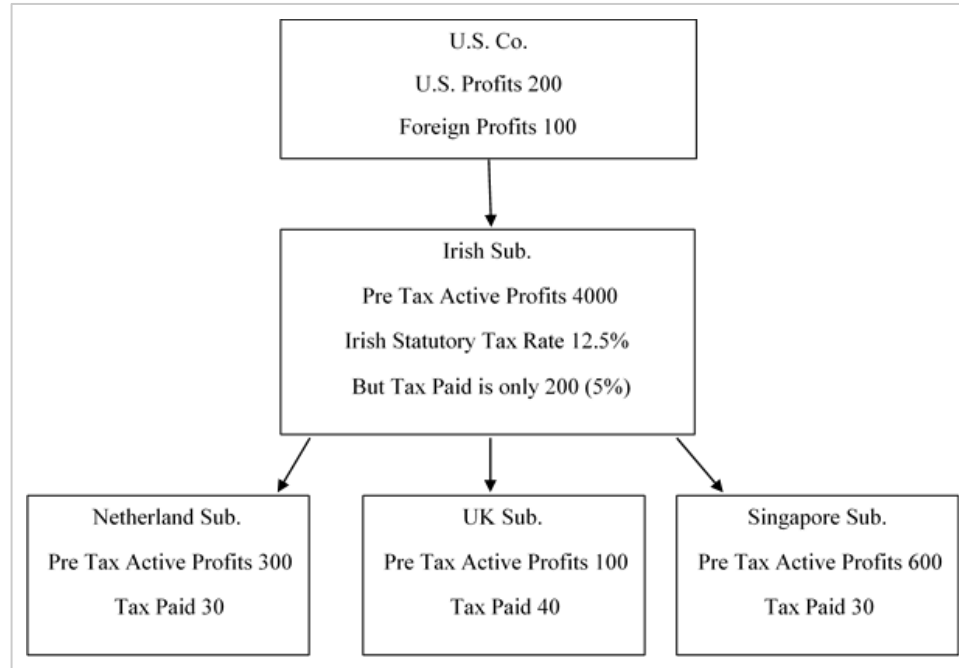
¹⁴⁰ See Roger Gordon, Laura Kalambokidis & Joel Slemrod, *A New Summary Measure of the Effective Tax Rate on Investment* (NBER Working Paper Series, Working Paper 9535, 2003), <http://www.nber.org/papers/w9535> [<http://perma.cc/2E9E-VJRH>].

¹⁴¹ See Seymour Fiekowsky, *Pitfalls in the Computation of "Effective Tax Rates" Paid by Corporations* (DEP'T OF THE TREASURY, OTA Paper 23, 1977).

¹⁴² See LEONARD G. ROSENBERG, *THE TAXATION OF INCOME FROM CAPITAL* 123-84 (A.C. Harberger & M.J. Bailey, eds., 1969).

To clarify my proposal, I would like to implement it on the following example:

Chart C



The current U.S. domestic law imposes current tax liability according to the regular corporate tax rate (35%) on the U.S. profits (200) and the Foreign Profits (100) of the U.S. Corporation (“U.S. Co.”), but all the global profits of the subsidiaries are not taxed under the current system. Although they are CFCs, their profits are not considered Subchapter F income and, therefore, any tax liability is deferred until repatriation. Obviously, U.S. Co. is locking out, or trapping, substantial amounts of foreign profits in the Irish Subsidiary to avoid U.S. taxation upon repatriation.

B. The Justifications of the Proposal

1. *Endless Possibilities of International Corporate Tax Avoidance*

United States multinationals, and actually most multinationals, have endless opportunities for international corporate tax avoidance. The strategies discussed throughout this article, of lock out, corporate inversions, Double Irish Dutch Sandwiches, tax havens, profit shifting, profit stripping, IP licensing, transfer pricing, interest deductions, and treaty shopping are only a few examples of endless possibilities of international corporate tax avoidance. While avoiding international corporate tax, U.S. multinationals legally exploit U.S. domestic tax law, foreign tax law, and tax treaty law - effectively the entire system of international taxation. Given these realities and understanding of the challenge, it is extremely difficult to tackle each method of tax avoidance individually. Upon the enactment, or amendment of, any specific anti-avoidance rule many new work-around tactics will inevitably be developed. As Dave

Hartnett, during his time as Director General at HM Revenue & Customs so clearly described it, when utilizing this type of target specific reform strategy, we are effectively “squeezing the balloon in one area only to see a new bulge emerge in another”.¹⁴³ This is especially true, in the current global digital economy, where sovereign countries compete to attract mobile capital and investments. It is impossible to fully coordinate between so many jurisdictions with such conflicting interests. In sum, international tax loopholes will always exist and be exploited.

Therefore, any effort to tackle international corporate tax avoidance must look at the comprehensive picture and target the bottom lines. This is exactly the idea behind my proposed Minimum Global Effective Corporate Tax Rate as General Anti-Avoidance Rule. The rule looks at the overall picture and if the bottom line is below the minimum tax, the law intervenes and imposes the minimum as an appropriate and clear-cut norm of taxation set by the legislator that must be respected and fully implemented. It represents a clear-cut statement, a “red line” of the legislator so to speak, and taxpayers cannot go below this red line under any circumstances.

2. *Effectiveness of Technical General Anti-Avoidance Rules*

The United States Judiciary has long been an activist in interpreting tax laws, fashioning a number of anti-avoidance doctrines to reflect the presumed intent of Congress in enacting the income tax laws. These doctrines are known under the names “substance over form, step transaction, business purpose, sham transaction, and economic substance”.¹⁴⁴ The doctrines do not have an explicit grounding in specific language of the statute. These doctrines, which are overlapping, have been developed gradually by the courts, and their contours are indistinct. Because their application is controversial, and because they are grounded in the specific fact patterns of decided cases, it is impossible to precisely describe them or to predict with certainty when they will apply.¹⁴⁵ For example, the “economic sham” doctrine generally means that transactions performed solely for tax avoidance reasons are disregarded for tax purposes. However, even after long experience, the courts have not worked out precisely how this doctrine is applied.

¹⁴³ Dave Hartnett, then Director General at HM Revenue & Customs in a speech in 2005 (Address to CIOT as part of 75th anniversary celebrations, 19 July 2005). *See also* OXFORD U. CTR. FOR BUS. TAX’N, *Tax Avoidance*, December 2012 (in particular, 17-20).

¹⁴⁴ *See* Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5 (2000); David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312 (2001); Symposium, *Business Purpose, Economic Substance and Corporate Tax Shelters*, 54 SMU L. REV. 37 (2001); Symposium, *Corporate Tax Shelters*, 55 TAX L. REV. 125 (2002); Ralph S. Rice, *Judicial Techniques in Combating Tax Avoidance*, 51 MICH. L. REV. 1021 (1953); Marvin A. Chirelstein, *Learned Hand’s Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440 (1968); Alvin C. Warren, *The Requirement of Economic Profit in Tax Motivated Transactions*, 59 TAX MAG. 985 (1981); Kenneth W. Gideon, *Mrs. Gregory’s Grandchildren: Judicial Restriction of Tax Shelters*, 5 VA. TAX REV. 825 (1986); Joshua Rosenberg, *Tax Avoidance and Income Measurement*, 87 MICH. L. REV. 365 (1988); Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. (2004).

¹⁴⁵ For an economic analysis of these norms and line drawing in tax law generally, *see* David Weisbach, *An Economic Analysis of Anti-Tax-Avoidance Doctrines*, 4(1) AM. L. & ECON. REV. 88, 88-115 (2002); David Weisbach, *Ten Truths about Tax Shelters*, 55(2) TAX L. REV. (2002); David Weisbach, *Formalism in Tax Law*, 66 U. CHI. L. REV. (1999); David Weisbach, *An Efficiency Analysis of Line Drawing in Tax Law*, 29 J. OF LEGAL STUD. 71 (2000); Philip A. Curry, Claire A. Hill & Francesco Parisi, *Creating Failures in the Market for Tax Planning*, 26 VA. TAX REV. 943 (2007); Yehonatan Givati, *Walking a Fine Line: A Theory of Line Drawing in Tax Law*, 34 VA. TAX REV. 469-502 (2015).

Several factors affect the judicial decision making in these cases. In a very interesting study of these factors on corporate shams cases, Blank and Staudt concluded: “Our empirical results run counter to the conventional wisdom that judges do not follow predictable patterns when deciding corporate abuse cases. We uncover a collection of factors that systematically lead Supreme Court Justices to favor (or disfavor) the government in the controversies that appear on the Court’s docket. By explaining the judicial decision making process and the factors linked to specific judicial outcomes, we believe that our study will increase knowledge and understanding of the law that governs and defines corporate abuse. This more nuanced understanding of corporate tax law, in turn, should have important practical implications for private practitioners, government lawyers, and policymakers.”¹⁴⁶

To overcome some of the ambiguity of the “economic substance doctrine,” for example, Congress enacted in 2010 Section 7701(O) of the IRC which codifies¹⁴⁷ the tests of the “economic substance doctrine” in these words: “**(1) Application of doctrine:** In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if — **(A)** the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position, and **(B)** the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.” This section contributed some clarifications on the implication of the doctrine but, still, there is a lot of ambiguity.¹⁴⁸ Additionally, the IRS didn’t really try to use Section 7701(o) or the common law doctrines to tackle tax avoidance in international transactions. The main usage of these tools had focused on internal tax avoidance transactions. For these two main reasons, ambiguity and internal usage, the effectiveness of Section 7701(o) and the common law doctrines in combating international corporate tax avoidance was limited. But their effectiveness in combating domestic corporate tax avoidance was much better.¹⁴⁹

¹⁴⁶ See Josh Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1708 (2012).

¹⁴⁷ In her article, *Tax Abuse - Lessons from Abroad*, 65 SMU L. REV. 551 (2012), Orly Sulami argued that Section 7701(o) of the Internal Revenue Codes, codifies the economic substance doctrine and constitutes a version of General Anti Avoidance Rule (GAAR). See also Jerome Libin, *Congress Should Address Tax Avoidance Head-On: The Internal Revenue Code Needs a GAAR*, 30 VA. TAX REV. 339 (2010) (analyzing Section 7701(o) and calling to move forward and adopt a GAAR).

¹⁴⁸ See Bret Wells, *Economic Substance Doctrine: How Codification Changes Decided Cases*, 10 FLA. TAX REV. 411 (2010); Orly Sulami, *Tax Abuse - Lessons from Abroad*, 65 SMU L. REV. 551 (2012); Philip Sancilio, *Note: Clarifying (Or is it Codifying) the Notably Abstruse: Step Transactions, Economic Substance, and the Tax Code*, 113 COLUM. L. REV. 138 (2013).

¹⁴⁹ See David Weisbach, *An Economic Analysis of Anti-Avoidance Doctrines* (John M. Olin Law & Econ. Working Paper No. 99, 2002), http://m.law.uchicago.edu/files/files/99.daw_tax-avoidance-new.pdf [<http://perma.cc/87GC-PRA5>], arguing that we can view tax shelters as a problem of defining the tax base. Shelters arise because of the difficulty of specifying or observing the base perfectly. They are, effectively, inadvertent omissions from the tax base. That is, we might have thought we were taxing income or consumption, but it turns out that if taxpayers buy and sell exotic derivatives in the right combination or change the corporate structure in the right way, taxes are not due. The tax base is narrower than we thought. This affects the elasticity of taxable income just like any other omission from the tax base. Anti-avoidance doctrines affect the ability of taxpayers to shift into shelters and, therefore, are a policy tool that affects the elasticity of taxable income and the efficiency of the tax system. As these doctrines are strengthened, the elasticity of taxable income goes down (in absolute value). By reducing the marginal elasticity of taxable income, the doctrines increase the efficiency of the tax system. Because the doctrines cannot perfectly identify tax avoidance, however, they induce a distortionary response by taxpayers, who may structure shelters to avoid the doctrines. This distortionary effect reduces their efficiency. The net benefit should be set equal on the margin to the marginal administrative cost of the doctrines.

The United States could, and should, learn from the positive experience of other jurisdictions, such as Canada, Australia¹⁵⁰, Israel¹⁵¹, and recently the UK¹⁵², who successfully combated domestic tax avoidance strategies by enacting a General Anti-Avoidance Rule. The United States should also improve the ambiguity of the GAARs and their limited use to combat international corporate tax avoidance.¹⁵³

In Canada, for example, the GAAR is codified in Section 245 of the Canadian Income Tax Act in very broad and vague words that consider almost any tax benefited transaction to be an “avoidance transaction” unless another bona fide purpose is proved.¹⁵⁴ Drawing the lines according to the Canadian GAAR in Section 245 involves judicial discretion and results in some uncertainty.¹⁵⁵ In their empirical study of the Canadian Tax Court GAAR decisions, Jinyan Li, Thaddeu and Hwong found that: “First, GAAR has been a game changer, albeit a modest one, with respect to the courts’ approach to tax-avoidance cases. Second, while considerable uncertainty remains with respect to the application of GAAR, a pattern in judicial decisions appears to be emerging. Third, there are indications that a judicial smell test is at play in some GAAR

¹⁵⁰ See Chris Atkinson, *General Anti-Avoidance Rules: Exploring the Balance between the Taxpayer’s Need for Certainty and the Government’s Need to Prevent Tax Avoidance*, 14 J. AUSTRAL. TAX’N (2012); G. T. PAGONE, *TAX AVOIDANCE IN AUSTRALIA* (2010); JEFFREY WAINCYMER, *THE AUSTRALIAN TAX AVOIDANCE EXPERIENCE AND RESPONSES: A CRITICAL REVIEW*, IN *TAX AVOIDANCE AND THE RULE OF LAW* 247 (1997); Julie Cassidy, *To GAAR or Not to GAAR: That is the Question: Canadian and Australian Attempts to Combat Tax Avoidance*, 36 OTTAWA L. REV. 259-313 (2004-2005); Susan Morse, Robert Deutsch, *Tax Anti Avoidance Law in Australia and the United States*, 49 INT’L LAW 111 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807077 [<http://perma.cc/MJ7K-EW3N>].

¹⁵¹ See ASSAF LIKHOVSKI, *FORMALISM AND ISRAELI ANTI-AVOIDANCE DOCTRINES IN THE 1950’S AND 1960’S IN STUDIES IN THE HISTORY OF TAX LAW* 339 (2004).

¹⁵² See Report by Graham Aaronson QC, *GAAR Study: A study to consider whether a general anti-avoidance rule should be introduced into the UK tax system* (2011), http://webarchive.nationalarchives.gov.uk/20130605083650/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf [<http://perma.cc/WZ5M-UKSJ>]; see also Antony Seely, *Tax Avoidance: A General Anti Avoidance Rule*, House of Commons Library, briefing Paper Number 06265 (May 13, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06265> [<http://perma.cc/H2XW-4TDC>]; Tax Law Review Committee, *Tax Avoidance* (Nov. 1997), <http://www.ifs.org.uk/comms/comm64.pdf> [<http://perma.cc/58MR-3XP6>]; Trace Bowler, *Tax Law Review Committee, Countering Tax Avoidance in the UK: Which Way Forward* (Feb. 2009).

¹⁵³ See ROSENBLATT, PAULO, *GENERAL ANTI-AVOIDANCE RULES FOR MAJOR DEVELOPING COUNTRIES* (2015); McMECHAN, ROBERT, *ECONOMIC SUBSTANCE AND TAX AVOIDANCE: AN INTERNATIONAL PERSPECTIVE*, (2013); SIMPSON, EDWIN AND STEWART, MIRANDA, *SHAM TRANSACTIONS* (2013); BROWN, KEREN, *A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE*, (2012).

¹⁵⁴ The literature on the Canadian GAAR is very rich and includes for example: DAVID G. DUFF AND HARRY ERLICHMAN, EDS., *TAX AVOIDANCE IN CANADA AFTER CANADA TRUSTCO AND MATHEW* (2007); NATHALIE GOYETTE, *COUNTERING TAX TREATY ABUSES: A CANADIAN PERSPECTIVE ON AN INTERNATIONAL ISSUE* (1999); WILLIAM I. INNES, PATRICK J. BOYLE, AND JOEL A. NITIKMAN, *THE ESSENTIAL GAAR MANUAL POLICIES, PRINCIPLES AND PROCEDURES* (2006); David Dodge, *A New and More Coherent Approach to Tax Avoidance*, 36(1) CAN. TAX J. 1-22 (1988); Brian J. Arnold and James R. Wilson, *The General Anti-Avoidance Rule—Part 1*, 36(4) CAN. TAX J. 829-87 (1988); Brian J. Arnold and James R. Wilson, *The General Anti-Avoidance Rule—Part 2*, 36:5 CAN. TAX J. 1123-85 (1988); and John R. Owen, *Statutory Interpretation and the General Anti-Avoidance Rule: A Practitioner’s Perspective*, 46(2) CAN. TAX J. 233-73 (1998); Brian J. Arnold, *Policy Forum: Confusion Worse Confounded—The Supreme Court’s GAAR Decisions*, 54(1) CAN. TAX J. 167-209 (2006); Brian Kearn and Bruce Lemons, *GAAR in the Tax Court After Canada Trustco: A Practitioner’s Guide* 55(4) CAN. TAX J. 745-76 (2007).

¹⁵⁵ See Jinyan Li “*Economic Substance*”: *Drawing the Line Between Legitimate Tax Minimization and Abusive Tax Avoidance*, 54(1) CAN. TAX J. 23 (2006); Brian Arnold, *The Long, Slow, Steady Demise of the General Anti-Avoidance Rule*, 52 CAN. TAX J. 488 (2004).

decisions; in particular, judicial decision making in GAAR cases appears to have been influenced by the judge's attributes, including experience on the Tax Court, gender, pre appointment experience, and regional ties."¹⁵⁶

The UK law changed dramatically upon the enactment of General Anti Abusive Rule in the Finance Act of 2013.¹⁵⁷ The adoption of a GAAR in the UK was based on the recommendations of the Aaronson Committee.¹⁵⁸ Leading tax scholars and economists in the UK have supported GAAR for many years.¹⁵⁹ This new GAAR counteracts "abusive tax arrangements" which is defined based on the purpose of the arrangement and its reasonable course of action.¹⁶⁰ This shift in the UK from judicial doctrines to a statutory GAAR is extremely important because the shift was made after years of experience with using specific anti-avoidance rules and disclosure rules as instruments in combating tax avoidance.¹⁶¹ The UK experience can serve as a valuable model for the adoption of a GAAR in the United States.

This is exactly the argument that I am making here. The UK and other jurisdictions' experiences prove that there is additional value in codifying general anti-

¹⁵⁶ See Jinyan Li, Thaddeus Hwong, *GAAR in Action: An Empirical Exploration of Tax Court of Canada Cases (1997-2009) and Judicial Decision Making*, 61 CAN. TAX J. 321 (2013).

¹⁵⁷ See *Tax Avoidance: A General Anti-Abuse Rule*, House of Commons Library, PARLIAMENT.UK (Apr. 2016), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06265> [<http://perma.cc/AKQ6-8BZ3>].

¹⁵⁸ See Report by Graham Aaronson QC, *GAAR Study: A study to consider whether a general anti avoidance rule should be introduced into the UK tax system* (2011), http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf [<http://perma.cc/4XP6-ALSJ>]; See also Antony Seely, *Tax Avoidance: A general Anti Avoidance Rule* (House of Commons Library, briefing Paper Number 06265 (May 13, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06265> [<http://perma.cc/XZ95-RMQP>]; *Tax Law Review Committee, Tax Avoidance* (Nov. 1997), <http://www.ifs.org.uk/comms/comm64.pdf> [<http://perma.cc/Y329-VCN8>]; Trace Bowler, *Tax Law Review Committee, Countering Tax Avoidance in the UK: Which Way Forward* (Feb. 2009).

¹⁵⁹ See Judith Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, BRIT. TAX REV. 332 (2004); See also Judith Freedman, *GAAR as a process and the process of discussing a GAAR*, BRIT. TAX REV. 1, 22-27 (2012); Michael Devereux, Judith Freedman and John Vella, *Tax Avoidance*, OXFORD U. CTR. FOR BUS. TAX'N, http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/TA_3_12_12.pdf [<http://perma.cc/82ZW-49DC>]; Michael Devereux, Judith Freedman and John Vella, *The Disclosure of Tax Avoidance Schemes Regime*, OXFORD U. CTR. FOR BUS. TAX'N (http://www.sbs.ox.ac.uk/sites/default/files/Business_Taxation/Docs/Publications/Reports/DOTAS_3_12_12.pdf [<http://perma.cc/P2RD-AQR9>].

¹⁶⁰ See *Tax Avoidance: General Anti-Abuse Rule*, GOV.UK (Jan. 2016), <http://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules> [<http://perma.cc/HZA7-KH98>].

¹⁶¹ See Antony Seely, *Tax Avoidance: A General Anti Avoidance Rule – Background History* (1997-2010) (House of Commons Library (May 13, 2015), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN02956> [<http://perma.cc/2FUR-ALYE>].

avoidance rules.¹⁶² They add to, and enhance, the specific anti-avoidance rules that are already being used, which are effective in combating tax avoidance at the national or domestic level, but are limited in scope when addressing international tax concerns and are often ambiguous.¹⁶³ We have learned a lot about fighting domestic tax avoidance¹⁶⁴ and this experience could, and should, be used to help combat international corporate tax avoidance through GAARs. I call on Congress to pass a GAAR. My proposed General Anti-Avoidance Rule does not use vague and discretionary terms such as “purpose” or “abuse.” Instead, it uses very technical criteria: Minimum Global Effective Corporate Tax Rate. My proposed GAAR clearly focuses on, and targets, international corporate tax avoidance, since it examines the Global Corporate Effective Tax Rate and makes sure that it does not fall below the minimum. As a result of these modifications, it is expected to be an effective, and unambiguous, tool in combating international corporate tax avoidance.

I do not agree with Arnold and Wilson, who argued that the effectiveness of GAAR’s on combating international tax planning is limited.¹⁶⁵ They analyzed three case studies that involve: an inbound treaty shopping in which the objective was to reduce source country tax; an outbound transfer of intellectual property in which the objective was to reduce residence country tax; and an outbound U.S. Tower Financing Structures designed to reduce both source and resident countries’ tax. They applied the Canadian specific and general anti-avoidance rules, as interpreted by the Canadian courts, on these cases to examine the effectiveness of the Canadian Anti-Avoidance regime in combating these international tax planning schemes. They found that “the anti-avoidance rules of most countries primarily target aggressive tax planning in the domestic context rather than in the international context. ... [T]he efficacy of a GAAR in curbing international tax planning is far from clear”¹⁶⁶ and that “to date, with few exceptions, the Crown has fared poorly in GAAR cases where it has asserted that treaty benefits should be denied in tax-avoidance cases.”¹⁶⁷ They argued that “[w]ith respect to international tax avoidance, even a combination of specific anti-avoidance rules and a GAAR may be insufficient; an effective response to international tax avoidance requires coordinated international action by governments, as discussed in connection with the OECD’s BEPS project.”¹⁶⁸

¹⁶² The EU believes in GAAR’s as an effective instrument to handle tax avoidance. In 2012 the Commission published an action plan to strengthen the fight against tax evasion and two sets of recommendations that were assigned to further discussions and implementation at the Platform for Tax Good Governance. The first Recommendation, on measures intended to encourage third countries to apply minimum standards of good governance in tax matters, which focused on transparency, exchange of information and lists of non-cooperative jurisdictions based on some criteria. This recommendation has developed in March 2015 to a “transparency package” that includes several channels of transparency and exchange of information between MS including automatic exchange of information on tax rulings. The second set of recommendations, on aggressive tax planning, which recommended Member States to adopt a general anti-abuse rule to counteract aggressive tax planning practices which fall outside the scope of their specific anti-avoidance rules; *See Platform for Tax Good Governance*, EUR. COMMISSION, http://ec.europa.eu/taxation_customs/taxation/gen_info/good_governance_matters/platform/index_en.htm [<http://perma.cc/JKU3-8RZL>].

¹⁶³ *See* Tim Edgar, *Building A Better GAAR*, 27 VA. TAX REV. 833 (2008).

¹⁶⁴ *See* David Weisbach, *Ten Truth About Tax Shelters*, 55 TAX L. REV. 215, (2001-2002).

¹⁶⁵ *See* Brian J. Arnold & James R. Wilson, *Aggressive International Tax Planning by Multinational Corporations: The Canadian Context and Possible Responses*, 7 SSP RES. PAPERS (2014).

¹⁶⁶ *Id.* at 18.

¹⁶⁷ *Id.* at 48.

¹⁶⁸ *Id.* at 28.

However, “the key issue presented by the OECD’s BEPS project is whether OECD member countries and other countries with large economies will be willing to take coordinated action against aggressive international tax avoidance. Given the current political paralysis prevailing in the United States, it seems unlikely that the U.S. will be able to take any effective action in this regard even if the U.S. government concludes that such action is desirable. Without action by the U.S., it seems unlikely that Canada, and other smaller countries, would be willing to take any significant action to curtail aggressive tax planning by their multinationals that might risk placing them at a competitive disadvantage vis-à-vis American multinationals.”¹⁶⁹

I argue that it is the effectiveness of the current GAARs, and their interpretation and implementation by courts on international tax avoidance, that is limited but it is not a general argument against GAARs and international tax planning. The details and the design of a GAAR determine its effectiveness. Based on this understanding, I propose a well-designed GAAR to combat international tax avoidance. I agree that the U.S. is the leading player and that, therefore, if the U.S. adopts my proposal, this will encourage other countries to adopt it as well, which will make a substantial contribution to curtailing international corporate tax avoidance on a global scale. Based on Former President Obama’s proposed minimum tax, and other minimum tax proposals in the U.S., it seems feasible, and reasonable, for the U.S. to adopt my proposal addressing political feasibility and constructive unilateralism, which I will elaborate on in later sections.¹⁷⁰

3. *Reducing the Lock Out Effect*

The proposed regime is expected to reduce the lock out effect since the tax burden on un-repatriated profits will rise and the gap between the tax burden on un-repatriated profits and on repatriated profits will decrease, meaning less tax benefits of lock out. This is especially true as long as the proposals and plans of reducing the U.S. corporate tax rate from 35% to around 25% are implemented. The repatriation holiday of 2004 proved that U.S. multinationals are interested in repatriation and are ready to pay a tax price for repatriation as long as the price is low.¹⁷¹ Of the roughly 9,700 companies that had CFCs in 2004, 843 corporations took advantage of the DRD, repatriating \$362 billion, of which \$312 billion was eligible for deduction.¹⁷² The companies that chose to take advantage of Section 965 and repatriate earnings in excess of their baseline averages were overwhelmingly large, multinational companies. The average total year-end assets of participating firms were more than \$24 billion, and the average amount repatriated was roughly \$429 million. Those firms were predominantly in mature industries.¹⁷³

¹⁶⁹ *Id.* at 56.

¹⁷⁰ Section V(B)(9)&(10).

¹⁷¹ Section 965, enacted as part of the Jobs Act in October 2004, allowed a U.S. corporate shareholder (USS) to elect, for one tax year, to receive an 85% dividends received deduction (DRD) on qualifying dividends received from its controlled foreign corporations. That allowance would generally reduce the effective tax rate on repatriated earnings to 5.25% (IRS, IRC 965 Dividend Repatriation Audit Guidelines, LMSB-0808-043, Doc 2011-16107, 2011 TNT 143-47 (Aug. 27, 2008).

¹⁷² Melissa Redmiles, *The One-Time Received Dividend Deduction*, 27 STATISTICS OF INCOME BULLETIN 102 (2008).

¹⁷³ *See Id.*, Roy Clemons & Michael R. Kinney, *An Analysis of the Tax Holiday for Repatriation Under the Jobs Act*, TAX NOTES 758 (2008).

The same is true the other way around. If the benefit of lock out is around 10%, then U.S. multinationals are expected to prefer repatriation. As the economic literature reveals, currently, U.S. multinationals do not repatriate foreign cash to avoid the U.S. repatriation tax.¹⁷⁴ It is proved that locked out cash due to repatriation tax costs leads managers to invest overseas, but these investments are less value enhancing, possibly reflecting agency issues. In other words, the cost of lock out is not just tax revenue losses but also economic losses as result of distorting investment decisions.¹⁷⁵ Therefore, reducing lock out would raise both tax revenues, as well as economic benefits, because the corporate decisions are expected to be motivated more by economic efficiency considerations than tax efficiency considerations, which will reduce the lockout distortions.¹⁷⁶ But, it is not clear, whether these economic benefits include investments in the United States and job creation since the experience of the 2004 tax holiday illustrated that firms that chose not to repatriate had more growth investment opportunities in the United States and invested more in growth in the years following the holiday. It has also been shown that there was no statistically significant increase in spending in research and development, capital expenditures, and acquisitions among the repatriating firms. The only statistically significant increase in spending by those firms was in share repurchases, suggesting the repatriated funds merely replaced funds that had already been allocated for investment, and that those funds, now freed up, were returned to shareholders.¹⁷⁷

4. *Limiting Profit Shifting*

My proposed regime is also expected to reduce profit shifting from a U.S. parent company to its foreign subsidiaries located in no, or low, tax jurisdictions, as well as profit shifting between the foreign subsidiaries from higher to lower tax jurisdictions. This is because all the profits of all the CFCs on global basis would be subject to the minimum tax. Hence, the tax benefits of profit shifting are very much reduced. No matter where the profits are located, as long as they bear less than 15%, the minimum tax will have to be paid, which is calculated on a global bases and does not differentiate between the different jurisdictions. Therefore, the incentives to shift profits between jurisdictions are substantially lowered.

As the literature reveals, profit shifting activities are very sensitive to changes in tax rates.¹⁷⁸ In a recent study, Dowd, Landefeld and Moore found that, “for U.S. multinational companies, the effect on profits reported in a foreign subsidiary of a 1

¹⁷⁴ See C. Fritz Foley, Jay C. Hartzell, Sheridan Titman & Gary Twite, *Why do firms hold so much cash? A tax-based explanation*, 86 J. OF FIN. ECON. 579, 579-607 (2007).

¹⁷⁵ See Michelle Hanlon, Rebecca Lester & Rodrigo Verdi, *The effect of repatriation tax costs on U.S. multinational investment*, 116 J. OF FIN. ECON. 179, 179-196 (2015).

¹⁷⁶ See Mihir Desai, C. Fritz Foley & James R. Hines Jr., *Repatriation Taxes and Dividend Distortions*, 54 NAT'L TAX J. 829, 829-851 (2001).

¹⁷⁷ See Roy Clemons & Michael R. Kinney, *An Analysis of the Tax Holiday for Repatriation Under the Jobs Act*, TAX NOTES, 759 (2008); see also Donald J. Marples & Jane G. Gravelle, *Tax Cuts on Repatriation Earnings as Economic Stimulus: An Economic Analysis*, CRS REPORT FOR CONG., CONG. RES. SERV. (2011).

¹⁷⁸ See Harry Grubert & John Mutti, *Taxes, Tariffs and Transfer Pricing in Multinational Corporate Decision Making*, 73 REV. OF ECON. & STAT., 285, 285-293 (1991); James R. Hines & Eric M. Rice, *Fiscal Paradise: Foreign Tax Havens and American Business*, 109 Q.J. ECON. 149, 149-182 (1994); Jost H. Heckemeyer & Michael Overesch, *Multinationals' profit response to tax differentials: Effect size and shifting channels*, 45 ZEW Discussion Papers 13 (2013).

percentage point increase in the net of tax rate (that is, a tax decrease in a foreign country) depends crucially on whether the country has a low rate or a high rate. Under the linear specification, a 1 percentage point reduction in the tax rate would result in a 1.4% increase in reported profits, regardless of whether the original tax rate was at 5% or 30%. However, under the quadratic specification, a change in the tax rate from 5% to 4% results in 4.7% increase in profits while a change from 30% to 29% results in a 0.7% increase in profits. We estimate that reported profits in Bermuda, the Cayman Islands, Ireland, Luxembourg, the Netherlands, and Switzerland would decline by more than \$100 billion in 2010 had these countries had statutory tax rates of 29% and average tax rates of 17%. This is nearly double the response we would get using a more traditionally estimated elasticity.¹⁷⁹ These and other tax havens are not expected to increase their tax rates but the home countries of multinationals could do that indirectly through my proposed minimum tax regime. This regime increases the effective tax rate on tax haven incomes and therefore, as the study reveals, is expected to limit profit shifting and the profits in tax havens would decline substantially.

Profit shifting would also be further limited as long as the OECD BEPS project moves forward and other countries implement the measures proposed by the OECD BEPS project in their domestic law or in their bilateral tax treaty network. I specially believe in two measures of the OECD to reduce profit shifting: the general anti-avoidance rule in action 6 concerning treaty abuse and the transparency and country-by-country reporting regimes in Reports 12 & 13 of the OECD. Obviously, further adoption of my proposed minimum global effective corporate tax rate as a GAAR in other jurisdictions (especially leading developed countries) unilaterally or multilaterally by the OECD would substantially contribute to the goal of limiting international profit shifting.

5. *U.S. Competitiveness*

“Competitiveness” is used extensively in the tax policy debate in connection to the nations as well as the corporations within them, although it seems more appropriate and convincing to debate the competitiveness of corporations.¹⁸⁰ The definition of competitiveness is not totally clear, nor is its role in the international tax debate.¹⁸¹ Roughly speaking, it means the ability of the U.S. multinationals to compete with their counterparts on investments and market shares globally. It is the idea of enabling U.S. multinationals to invest, and sell and expand their share in the markets of the global economy. To accomplish that, supporters argue that the United States should exempt its corporations on their foreign income while opponents argue that such an exemption is not needed because the competitiveness of U.S. multinationals is not threatened or significantly weakened as a result of the U.S. tax law.

As the data reveals, the argument that U.S. corporate tax rules make U.S. MNEs less competitive in foreign markets compared with European and Japanese MNEs is

¹⁷⁹ See STAFF OF JOINT COMM. ON TAX’N, 114TH CONG., *Profit Shifting of U.S. Multinationals* (Jan. 6, 2016).

¹⁸⁰ See Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFF. (Mar. 1994) 28; Eric Toder, *International Competitiveness: Who Competes Against Whom and for What?*, 65 N.Y.U. TAX L. REV. 505, 509 (2012).

¹⁸¹ See Michael S. Knoll, *The Connection Between Competitiveness and International Taxation*, 65 N.Y.U. TAX L. REV. 349, 351 (2012); Jane Gravelle, *Does the Concept of Competitiveness Have Meaning in Formulating Corporate Tax Policy?*, 65 N.Y.U. TAX L. REV. 323, 325 (2012).

generally wrong.¹⁸² I completely agree with the convincing argument that “[c]ompetitiveness has nothing to do with this,” as Professor Kleinbard expressed clearly.¹⁸³ U.S. multinationals plan their tax strategies because they want to increase profits by reducing costs, including tax costs. This is a simple and natural behavior for any multinational because corporations are meant to maximize their profits. This behavior does not stem from the fact that the U.S. corporate tax rate is high or because U.S. multinationals suffer any additional burdens that impact their competitive position. They avoid taxation and will continue to do so no matter what the U.S. corporate tax rate is, as long as there are ways to substantially reduce their tax bill. It should not surprise any policymaker that multinationals are doing their best to avoid international corporate tax and lower their effective taxation or that they are succeeding impressively.¹⁸⁴ The problem is that policymakers in the United States, and all over the world, have not responded to this exploitation of the current international tax regimes in a timely or effective manner. They must do so now.

My proposal is not expected to negatively affect the competitiveness of the U.S., or its domestic corporations, since the added tax burden is a low rate (15%) below the average corporate tax rate in most OECD and developed countries. In any case, U.S. multinationals are dominant in their fields of business and have substantial business advantages over their competitors that will enable these companies to maintain their share of the global markets (even if required to pay this proposed minimum tax) while contributing to the U.S. budget and the fairness of the U.S. tax system and society. These advantages will also contribute to the competitiveness of U.S. multinationals in comparison to other multinationals from territorial systems and in the relatively small real economy markets located in tax havens.

6. *Fairness*

The current situation is obviously unfair in many respects. It is unfair in terms of the low tax burden on big multinationals in comparison to the high tax burden on local corporations, small and medium as well. It is unfair in terms of the comparison between multinationals and individuals. While multinationals bear a one-digit tax burden, individuals are paying more than 30% tax rates. It is not surprising that the public is

¹⁸² Reuven S. Avi-Yonah & Yaron Lahav, *The Effective Tax Rates of the Largest U.S. and EU Multinationals*, 65 N.Y.U. TAX L. REV. 375, 377; Brian J. Arnold, *A Comparative Perspective on the U.S. Controlled Foreign Corporation Rules*, 65 N.Y.U. TAX L. REV. 473 (2012); Melissa Costa & Jennifer Gravelle, *Taxing Multinational Corporations: Average Tax Rates*, 65 N.Y.U. TAX L. REV. 391, 408 (2012).

¹⁸³ See Edward Kleinbard, *Competitiveness Has Nothing to Do with It*, 144 TAX NOTES 1055 (2014).

¹⁸⁴ See Kevin S. Markle & Douglas A. Shackelford, *Cross-Country Comparisons of the Effects of Leverage, Intangible Assets, and Tax Havens on Corporate Income Taxes*, 65 N.Y.U. TAX L. REV. 415, 415 (2012).

demonstrating and expressing this frustration in the streets and the media.¹⁸⁵ The problem of fairness is serious and must be solved.¹⁸⁶ I argue that my proposal improves the system in terms of fairness as well.

My proposal reduces the tax gap between big multinationals and small/medium-sized local corporations. The tax burden on big multinationals is expected to be no less than 15%, which makes it fairer in comparison with small/medium-sized local corporations. These small/medium corporations are very important to American society and the economy, and fair taxation of these corporations is an interest that the United States accepts and should advance.¹⁸⁷ My proposal tries to reduce the tax gap between multinationals and individuals, while admitting that there is difference between corporations and individuals for many reasons. Corporations will continue to pay less taxes, but only to a limit, and the limit is the minimum global effective corporate tax rate.

In my proposal, the jurisdiction to impose the minimum 15% tax is given to the resident country because the source country consciously chose not to act on its first right of taxation. Furthermore, in my opinion, under such circumstances, when the source country operates effectively as a tax haven, it seems more equitable to grant the right of taxation to the home country, because the home country, and its laws, are what enabled the multinational to create and benefit from a global business. This allocation of taxation is also justified, because it gives incentives for resident countries to adopt the proposed regime. In the long run, it might also produce a race to the top, since residence countries will be increasingly interested in adopting the regime and setting a minimum rate in order

¹⁸⁵ See TAX JUST. BLOG, <http://www.taxjusticeblog.org/> [<http://perma.cc/2ARL-L8L3>] (last visited Sept. 28, 2016); TAX JUST. NETWORK, <http://www.taxjustice.net/> [<http://perma.cc/2ARL-L8L3>] (last visited Sept. 28, 2016); AM. FOR TAX FAIRNESS, <http://www.americansfortaxfairness.org/> [<http://perma.cc/3DM5-VLH2>] (last visited Sept. 28, 2016); CITIZENS FOR TAX JUST., <http://ctj.org/> [<http://perma.cc/B9XW-WS3B>] (last visited Sept. 28, 2016); *The Tax Policy Blog*, TAX FOUND., <http://taxfoundation.org/blog> [<http://perma.cc/YW3D-92F6>] (last visited Sept. 28, 2016); Maya Forstater & Vijaya Ramachandran, *How Much Do We Really Know about Multinational Tax Avoidance and How Much Is it Really Worth?*, CTR. FOR GLOBAL DEV. (Jul. 12, 2015), <http://www.cgdev.org/blog/how-much-do-we-really-know-about-multinational-tax-avoidance-and-how-much-it-really-worth> [<http://perma.cc/82M6-68FG>]; Tax Sanity, FACEBOOK, <http://www.facebook.com/TaxSanity/> [<http://perma.cc/VX7L-4CWH>].

¹⁸⁶ “It’s clear that any proposal for bipartisan tax reform should restore fairness to the tax code. Currently, the tax code is riddled with loopholes that were systematically inserted by special interests resulting in the ability for large, multinational corporations to shift their tax responsibilities to small businesses, domestic businesses and average taxpayers. This creates winners and losers, where the winners are lawyers, accountants, tax advisors, and the losers are average taxpayers. We must correct this systemic unfairness where certain players manipulate our tax laws to their own advantage.” Email from the FACT (Financial Accountability and Corporate Transparency) Coalition to S. Comm. on Fin. Apr. 15, 2015), <http://thefactcoalition.org/wp-content/uploads/2015/04/FACTCoalition.Submission.SenateFinance.BusinessInternationalWorkingGroups.pdf> [<http://perma.cc/J3SK-CJDG>].

¹⁸⁷ See Press Release, White House, Statement by the President on National Small Business Week (May 12, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/12/statement-president-national-small-business-week> [<http://perma.cc/73W9-89G6>]; Mirit Eyal-Cohen, *Why is Small Business the Chief Business of Congress?*, 43 RUTGERS LAW J. 1 (2012); Mirit Eyal-Cohen, *Down Sizing the Little Guy Myth in Legal Definitions*, 98 IOWA LAW REV. 1041 (2013); Mirit Eyal-Cohen, *Legal Mirrors of Entrepreneurship*, 55 B.C. L. REV. 719 (2014); Ronald F. Wilson, *Federal Tax Policy: The Political Influence of American Small Business*, 37 S. TEX. L. REV. 15, 28 (1996) (discussing the impact and influence of small business organizations); Irwin L. Kellner, *A Bright Forecast for Small Businesses*, N.Y. TIMES (Jun. 24, 1984) (supporting the idea that small businesses are the business of our country); MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA (2d ed. 2003).

to get the right of taxation as the resident country. Finally, from an administrative point of view, it is easier and more efficient to have the resident country set, and impose, the minimum rate, since it is the only country that has all the information about the global incomes of its residents and has the ability to take into consideration the global circumstances of taxpayers and, thus, to impose a fair and effective minimum tax according to the proposed regime.

In sum, the international tax regime did not intend to produce “stateless income” or “homeless income” or “double non-taxation” or extremely low effective tax rates but rather intended to tax income at least once (the single tax principle). Minimum Global Effective Corporate Tax Rate is meant to keep this exact principle entirely enact and to limit extreme cases of low effective corporate tax rates. This will substantially contribute to the goal of making the U.S. international tax regime more equitable.

7. *Economic Efficiency*

Obviously, economic efficiency considerations have dominated the international tax literature since its beginning.¹⁸⁸ Both sides of the debate relied on economic efficiency to support their positions. Proponents of worldwide taxation argue that it is economically justified according to the criteria of CEN, while proponents of territorial taxation argue that it is economically justified based on CIN and CON criteria. However, these theoretical economic models did not solve the complexities of international taxation in the global digital economy of the twenty-first century. I agree with the criticism concerning the role of these criteria in fixing and designing the international tax regime. Reality is very complicated and different from the pure theoretical models, and policy should be made according to a very wide scope and complex set of considerations. For all these and other difficulties, the role of economic efficiency arguments in my proposal is limited. I mainly try to follow current ideologies of efficiency and limit any infringement of these ideologies. It seems to me that the proposed Minimum Tax follows these directions of thought.

8. *Political Feasibility*

¹⁸⁸ See Thomas Horst, A Note on the Optimal Taxation of International Investment Income, 94 Q.J. ECON. 793-798 (1980); Thomas Horst, The Optimal Taxation of International Investment Income: Reply, 97 Q.J. ECON. 381 (1982); Michael Keen & Hannu Piekkola, Simple Rules for the Optimal Taxation of International Capital Income, 99 SCANDINAVIAN J. ECON. 447-461 (1997); Joel Slemrod et al., The Seesaw Principle in International Tax Policy, 65 J. PUB. ECON. 163 (1997); James R. Hines Jr., The Case Against Deferral: A Deferral Reconsideration, 52 NAT'L TAX. J. 385 (1999); Michael Keen & David Wildasin, Pareto-Efficient International Taxation, 94 AM. ECON. REV. 259 (2004); James Hines, Reconsidering the Taxation of Foreign Income, 62 TAX. L. REV. 269-298 (2009).

After long discussions and debates, international corporate tax reform seems to be imminent, though it might be a limited rather than comprehensive reform.¹⁸⁹ Former President Obama and his administration made substantial progress in the process, and his view is very clear as was explicitly expressed in his final State of the Union on January 12, 2016, which was quoted at the beginning of this article. President Trump supported “[e]nd[ing] the deferral of overseas corporate income but preserv[ing] the foreign tax credit [and] [e]nact[ing] a deemed repatriation of foreign income at a 10% rate”.

The public is not satisfied with the current situation where corporations are exploiting the system and avoiding taxation. The unfairness of the current situation where individuals, mainly middle-class individuals, are bearing the brunt of the tax burden while corporations are paying so little tax is intolerable. The public has expressed its opinions clearly through the media and later may do so through the elections. Recent polling shows that the public feels strongly that corporations need to step up and contribute their fair share. For instance, by a 79% to 17% margin, voters want to “close tax loopholes to ensure that American corporations pay as much on foreign profits as they do on profits made in the United States.” By an 82% to 9% margin, voters believe that “reform[ing] the tax system by closing corporate loopholes and limiting deductions for the wealthy” should be used to “reduce the budget deficit and make new investments” rather than to “reduce tax rates on corporations and the wealthy.”¹⁹⁰

I agree with Avi-Yonah and Xu that “if nothing is done, multinationals will avoid the corporate tax. If that happens, ordinary middle class Americans will be reluctant to pay their taxes. Our tax system is built around voluntary cooperation; if most Americans refuse to cooperate, the IRS could not force them to do so. As the Greek experience has recently demonstrated, once a tax culture of non-payment is established, it is very hard to change. We need to do something about avoidance before it is too late.”¹⁹¹

Considering the political realities and public opinion, I do not believe that supporters of any extreme solution, such as ending deferral or shifting entirely to territorial taxation, will be fully victorious in the battle. In my understanding, limited and modest reforms or a compromise between the two extremes are likely much more feasible. My proposal is intended to provide exactly that. It makes big changes but still works within the current regime and is, therefore, limited and modest with regard to the underlying fundamental policy concepts and ideals.

Former President Obama’s administration, as mentioned, proposed and advanced a version of minimum taxation regime. President Trump also supports deemed

¹⁸⁹ “Speaker of the House Paul Ryan announced he will make tax reform—often considered a noble cause but a futile exercise—a priority in the upcoming year. ‘Instead of a tax code that all of us can live by, we have a tax code that none of us can understand,’ he said last month, speaking at the Library of Congress. ‘The only way to fix our broken tax code is to simplify, simplify, simplify. Close all those loopholes and use that money to cut tax rates for everyone.’” Jeffrey Kupfer et al., *How tax reform can get done in 2016*, CNBC (Jan. 21, 2016, 2:44 PM) <http://www.cnbc.com/2016/01/21/how-tax-reform-can-get-done-in-2016-commentary.html> [<http://perma.cc/6H7K-L3PG>]; John Harwood, *Despite Pledges, Tax Reform Remains an Elusive Goal*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/us/politics/despite-pledges-tax-reform-remains-an-elusive-goal.html?partner=rssnyt&emc=rss&_r=0 [<http://perma.cc/B5EZ-HWNC>].

¹⁹⁰ *Polling Questions on Key Corporate Tax Issues*, AMERICANS FOR TAX FAIRNESS (Jul. 21, 2014), <http://www.americansfortaxfairness.org/files/Polling-Questions-on-Key-Corporate-Tax-Issues.pdf> [<http://perma.cc/UTS3-AWPV>].

¹⁹¹ Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS*, HARV. BUS. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716125 [<http://perma.cc/JW5A-282R>].

repatriation in the rate of 10%. These proposals and the surrounding political correspondence indicate political support for an idea of minimum taxation, as introduced in my proposal.

I argue that my proposal is the appropriate compromise that meets the overlapping interests between Republicans and Democrats. Republicans would be happy with the lowered corporate tax rate of 25%. In return, they will need to compromise their demand for territorial taxation by accepting their own proposal of deemed repatriation, not as a transitional provision, but as a permanent law that imposes intermediate tax liability until repatriation at a rate of 15% rather than their proposed rate of 10%. The minimum 15% tax is de facto similar to a deemed repatriation tax. However, it is not identical for several reasons. It is independent in the sense that it produces an independent and separate tax liability; it is conditional, depending on the global effective tax rate, and it is an interim liability because upon repatriation, full taxation will be imposed. This compromise would satisfy the Democrats to the best of my understanding. This is because it de facto keeps worldwide taxation and ends deferral partially rather than fully. It lowers the statutory corporate tax rate, but at the same time, it increases the effective corporate tax rate, mainly on multinationals. It will level the playing field between multinationals and local small/medium-sized corporations as well as between corporations and individuals. It is a balanced compromise between the interests of corporations and the public. In sum, I advocate the political adoption of my proposed Minimum Global Effective Corporate Tax Rate as a general anti-avoidance rule in the Internal Revenue Code by the Congress, the sooner the better.

9. *Constructive Unilateralism*

Constructive unilateralism is a creative term introduced by Professor Avi-Yonah to reflect the role of the United States in the international arena of taxation. In this role, the United States has acted unilaterally and introduced international taxation rules in its domestic law and model tax treaty, such as the foreign tax credit, the CFC rules, and FATCA. These rules gained international adoption and constructively contributed to the development of the world's international tax regime. According to Avi-Yonah, historically, most of the advances in international taxation occurred when the U.S. has led the efforts, not because it has followed in the footsteps of other countries. Positive results can be expected if the U.S. maintains its leadership by "constructive unilateralism."¹⁹² I wholeheartedly agree with this argument and believe that the U.S. could, and should, continue to play this role in the context of limiting international corporate tax avoidance. However, I do not entirely agree with the recent move of Avi-Yonah toward more global multilateralism. Global multilateralism can be an option that would contribute substantially in solving difficult issues of international taxation, but that is for the long run, not the short run. Similarly, I also do not agree with Zucman's multilateral proposals in the short term, although we share the same notion and argument that "the United States and Europe can advance alone in reforming the taxation of companies. It is up to them to choose the way in which they wish to tax multinationals. An EU-US accord would build

¹⁹² See Reuven S. Avi-Yonah, *Constructive Unilateralism: US Leadership and International Taxation*, U. OF MICH. PUB. L. & LEGAL THEORY RES. PAPER SERIES, Paper No. 463 (Jun. 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622868 [<http://perma.cc/X7S9-HUDA>].

the foundation for a global base taxation that would put an end to the large scale shifting of profits to tax haven countries.”¹⁹³

At this stage, I believe that the U.S. could, and should, act unilaterally while still taking into account the inevitable, and necessary, changes being made at the international level. The U.S. cannot ignore the OECD BEPS project and must take it into account in setting its unilateral rules by trying to limit any prominent contradictions and by respecting and cooperating with the OECD BEPS ideas to the extent possible. The U.S. cannot ignore the substantial actions of the EU, including the EU Action Plan for Fair and Efficient Corporate Taxation in the EU and the most recent Anti-Tax Avoidance Package published on January 28, 2016.¹⁹⁴ If the U.S. does not act, it will be led by all the other institutions and jurisdictions that have been making substantial changes in recent years. Traditionally, it is better for the U.S. to keep its leadership in international taxation by appropriately handling the most important and urgent challenge of international corporate tax avoidance. I expect that if the U.S. adopts my proposal, more countries will follow the U.S., as happened before through the processes of constructive unilateralism. By fixing the U.S. system of international taxation unilaterally through the adoption of my proposed Minimum Global Effective Corporate Tax Rate, the United States will make an important and effective contribution to fixing the global system of international taxation in the twenty-first century.

C. Comparisons: The Proposal & Other Proposals of Minimum Taxation

1. *Former President Obama’s 19% Minimum Tax on Future Foreign Income*

As mentioned earlier, on several occasions, including in his FY 2016 address, Former President Obama proposed a one-time mandatory 14% tax on previously untaxed foreign income and a 19% minimum tax on future foreign income. There are some similarities between this proposal and my proposal. Both proposals believe normatively that a minimum tax rate is required because going below the minimum is unfair and not appropriate. However, there are many differences between the proposals. First, the main philosophy and purpose behind Former President Obama’s proposal is limiting deferral while the main philosophy and purpose behind my proposal is to design a general anti-abuse rule focused on international tax avoidance to limit tax avoidance. Second, Former President Obama’s proposal is built on a statutory corporate tax rate, while my proposal is built on effective corporate tax rate. Third, Former President Obama’s proposal examines the American tax rate only, while my proposal examines the global effective tax rate. Fourth, Former President Obama’s proposal imposes a final minimum tax, while

¹⁹³ See ZUCMAN, *supra* note 9, at 112-113.

¹⁹⁴ The package contains anti-tax avoidance rules in six specific fields: a general anti-avoidance rule, exit tax, CFC rules, deductibility of interest, and a switch over clause and a framework to tackle hybrid mismatches. See EUR. COMMISSION, *Action Plan on Corporate Taxation* (Jun. 2015), http://ec.europa.eu/taxation_customs/taxation/company_tax/fairer_corporate_taxation/index_en.htm [<http://perma.cc/J7XT-3DZX>]; *Anti Tax Avoidance Package*, EUR. COMMISSION, (Jan. 2016), http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm [<http://perma.cc/B5JT-A45R>].

my proposal imposes the minimum tax as a general anti-avoidance norm for the current point of time with the final tax outcomes being determined later upon repatriation.

This last point is very important. My proposal does not intend to reduce the corporate tax on foreign income to 15%, and it would not do so because the tax liability according to the proposal is meant to be an interim liability until repatriation. Furthermore, my proposal does not include any tax holiday concerning previous earnings, while Former President Obama's proposal is meant to reduce the U.S. corporate tax on foreign income to 19% and grant a repatriation holiday of 14%. For this exact reason, in their September 25, 2015 opinion, the twenty-four international tax experts opposed an extreme reduction of the tax burden and a generous tax holiday.¹⁹⁵

2. *Shay, Fleming & Peroni Interim Minimum Tax*

In analyzing Former President Obama's minimum tax, Stephen Shay, Clifton Fleming, and Robert Peroni criticized Former President Obama's minimum tax proposal and argued that it risks the U.S. tax base since it imposes final reduced tax liability on foreign income.¹⁹⁶ As an alternative, they proposed an interim minimum tax. In their opinion, "[t]he preferred approach to strengthening the CFC rules is to adopt an interim minimum tax equal to a material percentage of the U.S. corporate rate. The minimum tax amount would be determined on a country-by-country basis, taking into account each CFC with positive earnings and the foreign income tax paid. The intent would be to impose an "additional tax amount" that would cause the effective rate of tax on earnings from each country to be not less than the minimum tax rate. The CFC would be deemed to distribute the amount of earnings that, when included in the income of its U.S. shareholder, would result in U.S. tax equal, in the aggregate, to the additional tax amount. The earnings deemed distributed would thereafter constitute previously taxed earnings. Sections 959 and 961 would apply to prevent a second taxation of these earnings. This minimum tax reform should be accompanied by the enactment of provisions that would reduce the incentive for a U.S. parent corporation to shift its tax residence abroad. The reduced incentives to shift income to a low-taxed CFC and the increased amount of previously taxed earnings, by imposition of the minimum tax, would mitigate the incentive to hold excess earnings offshore and thereby ameliorate the lockout problem. Although implementation of an interim minimum tax proposal as described in this article would be second best to ending deferral, our preferred reform, it would be a material improvement over current law."¹⁹⁷

My proposal is also an interim rather than final minimum tax regime. However, I use a global basis rather than per-country basis. This is an important difference that stems from the fact that my focus is different than the focus of the authors. My focus is tax avoidance globally, while their focus is ending deferral and taxing foreign income as similarly as domestic income. Therefore, it is not surprising that they propose a minimum tax rate that is very close to the corporate statutory tax in the U.S., while I

¹⁹⁵ See *24 International Tax Experts Address Current Tax Reform Efforts in Congress*, AM. FOR TAX FAIRNESS (Sept. 25, 2015), <http://americansfortaxfairness.org/files/24-International-Tax-Experts-Letter-to-Congress-9-25-15-FINAL-for-printing.pdf> [<http://perma.cc/FL5F-6HWT>].

¹⁹⁶ See Shay, *supra* note 31.

¹⁹⁷ *Id.* at 722-23.

propose a minimum global tax rate that represents a good indicator of tax avoidance activities and takes into account corporate tax rates globally. In addition, the authors' proposal imposes the tax liability on the U.S. shareholders. To do so, it considers the profits as deemed dividends, whereas my proposal imposes a new tax liability at the U.S. corporate level rather than the U.S. shareholder level, without any deemed construction, rather as a new and independent interim tax liability.

3. *Grubert & Altshuler Minimum Tax Versions*

As mentioned earlier, Grubert and Altshuler discussed four versions of minimum tax in great detail and conclude that country-by-country minimum tax with current deduction of real investment is the appropriate regime.¹⁹⁸ I agree with their analysis concerning the merits and advantages of minimum tax regimes in reducing profit shifting and imposing fair and efficient tax on cross border income. However, I differ, and disagree, on a few aspects and details: First, my philosophy and main concern is international corporate tax avoidance, and therefore, I am focused on developing a general anti-avoidance rule to cope with these practices. Second, my minimum tax is imposed on any return, normal and excess, while they limit and design their preferred minimum tax regime to excess returns. Third, my minimum tax is an interim tax, while their minimum tax is final. Fourth, I support a global minimum tax rather than country-by-country minimum tax for several reasons. Although they argue that overall minimum tax is worth further consideration, they ultimately support a country-by-country minimum tax.

D. Exploring Counter Arguments

1. *The Presumption of Illegitimate Tax Avoidance Based on Low Effective Corporate Tax Rate is Too Strong*

One of the main expected arguments against my proposal is that it uses a global effective corporate tax rate as a definite proxy of illegitimate corporate tax avoidance and that that proxy is not always accurate. I agree that a low effective tax rate is not an inclusive and definite indicator of illegitimate tax avoidance. I accept that in some cases of a low global effective tax rate such rates are completely legitimate and do not necessarily represent any tax avoidance scheme. It is true that the presumption is too strong, but the considerations of simplicity, certainty, and avoidance of administrative discretion outweigh the counterargument. In the tradeoff, I prefer a simple and strong presumption, even at the expense of a few limited unfair cases or generalizations in lieu of a complex rebuttable presumption that necessitates a case-by-case examination and involves administrative discretion as well as high administrative and litigation costs. Above that, at the root of my proposal is not just the idea of preventing tax avoidance, but also the idea that the minimum tax is the red line, at least as an interim liability, that we as an American society are requiring from our corporations as their fair taxation and contribution to the American economy, society, and democracy.

¹⁹⁸ See Grubert *supra* note 32.

2. *Unilateralism & Contradiction with Treaty Law*

It might be argued that unilateral change of tax outcomes resulting from laws of other countries is inappropriate and contradicts treaty-based obligations. My boundaries in this regard are clear and strict. As long as a country is changing the tax outcomes of its residents, it can do so unilaterally. Any country has the full right to determine the tax outcomes of its multinationals on their worldwide income no matter what the tax rules of the other jurisdictions may be. However, countries could not, and should not, unilaterally change the tax outcomes of residents of other countries in contradiction to a treaty that is in effect. The OECD references these same boundaries as well. The OECD confirmed recently that domestic legislation or case law that adopts general anti-abuse rules do not contradict treaty law since treaties themselves aim to prevent treaty abuse.¹⁹⁹

VI. CONCLUSION

The United States' international corporate tax system is broken. The world international corporate tax regime is broken. The challenge of international corporate tax avoidance is undoubtedly one of the most serious issues within these broken systems. Implementing international tax policy law that protects the fairness of taxation is of the utmost importance, not only for purposes of meeting the needs of a twenty-first century global digital economy, but also for purposes of safeguarding the very structure and essence of the American society and democracy. Thus, the United States must fix the system sooner than later.

I propose and call for enacting a new general anti-avoidance rule according to which if the Global Effective Corporate Tax Rate of any U.S. multinational and its CFCs is below the minimum of 15%, the U.S. multinational shall pay the IRS the tax gap up until the minimum on its global income as an interim and independent tax liability. I argue that this proposal would contribute substantially to the current efforts to cope with international corporate tax avoidance. Adopting this proposal will improve the fairness of taxation, thereby strengthening and protecting American democracy, its economy, and society. Finally, if the U.S. continues in its tax leadership role through constructive unilateralism, it will prompt effective and efficient advancement and improvement of the global international corporate tax regime, which will better equip the global community to meet the challenges of the twenty-first century.

¹⁹⁹ OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 - 2015 Final Report* 85-88 (2015), <http://www.oecd.org/tax/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report-9789264241695-en.htm> [<http://perma.cc/EU7U-2HJZ>].