

Global Minimum Taxes Only Operate When We Cooperate

TXLW6739M – International Taxation

Osgoode Hall Law School

Cody P. Stokowski

220807012

Cody13@yorku.ca

May 16, 2024

TABLE OF CONTENTS

1. ABSTRACT.....	3
2. BASE EROSION AND PROFIT SHIFTING.....	
3. OVERVIEW OF THE TWO-PILLAR INITIATIVE.....	4
A. Summary of Pillar One.....	5
B. Summary of Pillar Two.....	6
4. CURRENT FORESEEABLE FUTURE OF PILLAR-TWO IMPLEMENTATION.....	10
A. Pillar One’s Stagnant State of Affairs.....	5
i. Canada.....	
ii. United States	
iii. United Kingdom.....	
iv. Australia.....	
B. Pillar Two’s Current Implementation.....	
i. Canada.....	
ii. United States	
iii. United Kingdom.....	
iv. Australia.....	
5. CONCLUSION.....	11
6. BIBLIOGRAPHY.....	16

1. ABSTRACT

Globalization has been defined as “the process by which particular goods and services, or social and cultural influences, gradually become similar in all parts of the world.”¹ This definition has never been more accurate than it is today with commerce transcending borders, specifically digital commerce. However, tax systems are very much defined by their political and legal borders.² This creates the need for cooperation between jurisdictions who are otherwise providing goods or services to another, and at the same time a mechanism to resolve competing differences in their tax legislation or policies. To what extent are countries prepared to cooperate and incorporate global tax regimes that set a baseline or minimum tax rate by legislating domestic laws to implement a global standard? We will explore this question and ultimately find that the results are still quite mixed as a result of hesitation to adopt a global tax regime. There have been early adopters and jurisdictions who are now just getting around to legislating domestically to implement such a system, while others are entirely resistant.

This paper will comparatively cross-analyze a handful of jurisdictions and the implementation of the Two-Pillar initiative released in 2021 by the Organization for Economic Cooperation and Development (“OECD”) / G20 Inclusive Framework on Base Erosion and Profit Shifting (“Two-Pillar Initiative”). The primary objective of the Two-Pillar initiative has been to “combat global profit shifting and base erosion”³ through a “consensus-based set of international tax rules”⁴ based on the draft GloBE Rules. It does so by creating minimum tax standards and rates to ensure MNEs

¹ Cambridge Dictionary - <https://dictionary.cambridge.org/dictionary/english/globalization>

² Cite Li.

³ <https://www.grantthornton.global/en/insights/articles/understanding-the-global-implications-of-pillar-two-model-rules/>.

⁴ https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612.

“pay their fair share of tax where they operate and generate profits.”⁵ This paper will explore the extent to which countries are currently cooperating and incorporating global tax regimes into domestic legislation to combat tax-base erosion and profit shifting. As outlined in this paper, I find that some jurisdictions such as Canada, Australia, and the United Kingdom, are prepared to domestically legislate to administer a global minimum 15% tax on MNE revenues (subject to threshold limitations) thereby implementing pillar Two, while others such as the United States are not. Jurisdictions, even Canada more recently, are not prepared to forgo taxing digital service revenues while awaiting cooperation from all signatory jurisdictions to implement pillar One. Again, the United States is not prepared to agree to be bound by a minimum (if any) tax rate on digital services at this time. I argue that without willing cooperation from signatory jurisdictions, in the absence of legal force, political agreements aren’t worth the paper they are printed on. Where does this leave us? With great uncertainty as to how digital services will be taxed globally going forward. Based upon the global digital economy’s reach and revenue generation (currently estimated at 15% of global GDP⁶), it is my position that administration of a consistent global taxation of digital services is imperative to maintain the tax base in jurisdictions outside of the United States. More effort towards cooperating on a minimum taxation of digital services is required as our global economy continues to develop more and more online to prevent US MNEs shifting profits out of a jurisdiction at will. However, an issue I find unresolved by my research is how to incentivize MNEs, primarily US based, to buy into possibly paying more taxes, or succeeding tax revenues to other jurisdictions. Perhaps the only way to incentivize participation is

⁵ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> page 3

⁶ <https://www.weforum.org/agenda/2022/08/digital-trust-how-to-unleash-the-trillion-dollar-opportunity-for-our-global-economy/#:~:text=The%20World%20Bank%20estimates%20that,faster%20than%20physical%20world%20GDP.>

to create barriers, such as banning digital service offering platforms, like China has against Meta domestically.

2. BASE EROSION AND PROFIT SHIFTING

As we have witnessed with the creation of the US GAMAM⁷ companies and their global business operations, specifically digital services, there are new and emerging tax related issues that are more complicated to resolve through bilateral tax treaties, specifically without further guidance on international taxation of these services. This brings about issues of tax residency (which may be defined differently in competing jurisdictions) and raises questions of tax-base erosion and profit shifting (“BEPS”) when corporations are able to draw revenue from a market jurisdiction without that jurisdiction having taxing rights over those revenues. Therefore, what we see with the rise of globalization is the mismatch between the market locations where digital services emanate from (and revenues are declared and taxed) and the location of platform users (where revenues escape local taxation). For example, it has been found that in 2020, 40% of the value created originated from North American markets, while 40% of global internet users were based in East and Southeast Asia.⁸

BEPS are tax planning strategies implemented by multinational enterprises (“MNEs”) to “exploit gaps and mismatches in tax rules to avoid paying tax.”⁹ For example, Apple previously taking advantage of Ireland’s low corporate tax rates despite no physical presence or economic

⁷ The Big Five technology companies: Google, Amazon, Meta, Apple and Microsoft; see <https://www.investopedia.com/terms/g/gafam-stocks.asp>.

⁸ <https://taxfoundation.org/research/all/global/digital-taxation/>.

⁹ <https://pro.bloombergtax.com/brief/beps-the-oecd-taxation-of-the-digital-economy/>.

activity in the jurisdiction¹⁰ which ultimately erodes the tax base of countries by shifting profits outside of the reach of the taxing authority of a particular jurisdiction, in that case the United States. Apple of course would argue that the issue isn't the amount of tax paid, but the appropriate jurisdiction to tax active business income. Their position would be that they are paying taxes where they operate, in that case Ireland. In a world where countries are seeking to attract business development and direct foreign investment, at first blush this example appears in line with the idea that profits should be taxed where business activities take place and value is created.¹¹ It appears beneficial to allow MNEs, such as Apple, to bring business operations to such jurisdictions to help drive economic growth through increased GDP. But is it fair for MNEs to be at liberty to take advantage of lower tax rates when the majority of their operations, or all, emanate from a jurisdiction with higher tax rates? That's a debate for another day. The focus here is on the question of what happens when an MNE like Apple elects to do business in another jurisdiction but refuses to pay taxes there? In other words, what if Apple didn't elect to pay taxes in Ireland? Shouldn't Ireland have taxing rights since Apple was operating and had an incorporated office there? What is the majority of Apple's customers live in India and not Ireland? And shouldn't there be a minimum tax percentage payable? Fortunately, this is where the Two-Pillar initiative has been proposed to operate, allowing the user jurisdiction to tax digital service revenues of the MNE (in certain circumstances), and create a 15% minimum global tax rate.

The question remains, how do we harmonize legislation across different jurisdictions to ensure consistent taxation rates? How do we ensure consistency between the anti-avoidance rules

¹⁰ See <https://www.reuters.com/article/idUSKCN24G004/>.

¹¹ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> page 3

implemented by different countries? How about consistent administration frameworks? The short and simple answer is, there is no way without buy-in from countries transacting with one another to follow a common set of rules. It's a global effort. Fortunately, 135 jurisdictions¹² came together and through their cooperation of the OECD / G20 Inclusive Framework on Base Erosion and Profit Shifting, released the Two-Pillar initiative in 2021 to realign taxation with global economic activities through a “consensus-based set of international tax rules”¹³ that would ensure MNEs “pay their fair share of tax where they operate and generate profits.”¹⁴

As alluded to, the primary objectives of the Two-Pillars are to “combat global profit shifting and base erosion.”¹⁵ To accomplish this, the signatory jurisdictions are to cooperate to implement global minimum taxes. With the OECD's draft global anti-base erosion model rules (“GloBE Rules”),¹⁶ which are applicable to international MNE groups with annual revenue of EUR 750 million, or more,¹⁷ jurisdictions are able to craft fairly consistent legislation. In other words, the draft GloBE Rules uniform wording is incorporated into domestic legislation of Inclusive Framework members to administer a global minimum tax. Today, over 135 Inclusive Framework members, including Canada, have joined the Two-Pillar Initiative.¹⁸

¹² https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612.

¹³ https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612.

¹⁴ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> page 3

¹⁵ <https://www.granththornton.global/en/insights/articles/understanding-the-global-implications-of-pillar-two-model-rules/>.

¹⁶ OECD (2024), Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (2023): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/b849f926-en>.

¹⁷ <https://www.oecd.org/tax/beps/minimum-tax-implementation-handbook-pillar-two.pdf>.

¹⁸ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> page 3

Unfortunately, we are dealing with international law where there is no legal authority to impose these GloBE Rules onto signatory jurisdictions. At its core this is a political agreement, therefore, the Two-Pillar initiative really has “no legal force.”¹⁹ Again, politics and law have borders and sometimes it’s difficult to reconcile these issues with a borderless economy.

Besides the obvious lack of an international tax tribunal or court to resolve competing tax claims by opposing tax system jurisdictions, another issue that arises is tax treaties don’t create new tax obligations.²⁰ Tax treaties assist with the resolution of competing priority over taxing income by two or more jurisdictions. In other words, tax treaties assist with the reconciliation of tax competition in the global market through limiting double taxation and tax avoidance. However, there are situations where tax treaties don’t resolve the shortfall of taxes being paid by big MNEs. This has been a catalyst for the development of the GloBE Rules to provide guidance for countries to follow in legislating domestic tax laws that have some uniformity in their application to taxing MNE income. Such model rules still don’t create new international tax obligations (similar to tax treaties), but they do create a uniform standard to be legislated at domestic levels of those 135 jurisdictions that have agreed to combat global tax avoidance issues, which will be explored in further detail in this paper.²¹ However, as we will see, there are shortfalls beyond the obvious issues of access to information cross-border, the need for cooperation, and the competition to attract foreign investment.

¹⁹ Li – page 5 -

https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3972&context=scholarly_works

²⁰ Cite Li for this

²¹ Cite Li – page 5 -

https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3972&context=scholarly_works

One of the primary issues we will explore is that some countries are reluctant to now incorporate the GloBE Rules into domestic legislation, thereby failing the implementation of the both pillars, or one pillar, of the Two-Pillar initiative. Again, we are grappling with politically driven motives, local tax authorities exercising their tax sovereignty without limitations over local firms, and reluctance to cede taxing rights. At best we have a political agreement that remains nothing more than paper unless there is cooperation and buy in from the signatory jurisdictions. As we will see, one major jurisdiction producing a large portion of global GDP, such as the United States, can prevent these initiatives from being implemented, leaving us with the same uncertainty in taxing MNEs that we started with.

3. OVERVIEW OF THE TWO-PILLAR INITIATIVE

Generally, Two-Pillars were developed to “address the tax challenges of the digital economy.”²² That is, to create an international standard for minimum tax irrespective of source and users, and where value is created. As a consensus-based initiative, the GloBE Rules require those Inclusive Framework members to adopt a common minimum level of tax on income by applying a system of top-up taxes. This is accomplished by the respective jurisdiction drafting domestic legislation that ensures consistent implementation and administration of the GloBE Rules’ intentions and verbiage (for consistency with interpretation and administration, an issue that has been raised by Canada’s draft legislation discussed below).²³ The GloBE Rules provide guidance on the appropriate wording in draft form and supporting commentary to implement the

²² OECD (2024), Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (2023): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/b849f926-en>.

²³ OECD (2024), Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules (2023): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/b849f926-en>.

Two-Pillar initiatives. Currently, the Two-Pillar Initiatives, are slowly being implemented through domestic legislation as discussed below. Some jurisdictions, including Canada, have elected to implement domestic (mostly temporary) DSTs, and others like the United Kingdom who were first movers are already contemplating transitioning away from their DST to a new global minimum 15% tax system. Other countries are agreeing to forgo the implementation of a domestic DST while negotiations for a global tax system are underway, such as Australia.

A. Summary of Pillar One

The most significant aspect of pillar One is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (“MLI”). This MLI essentially would supplement, or modify to the extent necessary, all existing tax treaties signed by Inclusive Framework members, such that the governments would no longer be required to negotiate tax treaties going forward.²⁴ Australia for example, currently prefers this approach.

Essentially, through a nexus and profit allocation set of rules, market jurisdictions would have an expanded right to tax profits (25% rate over 10% margin with a EURO 20 billion revenue threshold²⁵), irrespective of whether the international MNE has a physical presence in the jurisdiction. This includes the imposition of a tax on digital services provided by MNEs.²⁶ This requires cooperation to improve tax certainty, including all jurisdictions removing their own domestic digital service taxes.²⁷ As discussed below, even if other countries agree to repeal their DST legislation, the United States refuses to approve this pillar, thus preventing its implementation

²⁴ <https://pro.bloombergtax.com/brief/beps-the-oecd-taxation-of-the-digital-economy/>.

²⁵ <https://crsreports.congress.gov/product/pdf/R/R47988>

²⁶ <https://www.bdo.ca/insights/canadas-digital-services-tax-are-your-digital-services-caught-in-the-net#:~:text=The%20DST%20is%20intended%20to,for%20the%20DST%20to%20apply>.

²⁷ [International tax reform: Multilateral Convention to Implement Amount A of Pillar One - OECD](#)

and creating an opportunity for countries to continue to, or commence, taxing digital services unilaterally. This includes Canada as discussed within.

B. Summary of Pillar Two

The primary purpose of pillar Two is to create a global minimum tax of 15% applicable to active business profits of international MNEs, irrespective of where they are domiciled, headquartered, or where business activities take place and value is created. The applicable GloBE Rules required to be implemented at a domestic level are the Income Inclusion Rule (“IIR”), Qualifying Domestic Minimum Top-Up Tax (“QDMTT”), and Undertaxed Tax Payments Rule (“UTPR”), which together raise the minimum effective tax rate of a particular jurisdiction to a minimum of 15%.²⁸ Pillar Two does not require the approval of all members to implement. Currently approximately 37 countries have introduced draft legislation, and an additional 13 jurisdictions intend to implement pillar Two domestic legislation.²⁹ However, this could create administration issues and convergence of tax laws cross-border in the absence of domestic implementation or inconsistency with drafting. Whether or not there will be issues with the administration of a consistent 15% minimum tax payable globally without infrastructure is yet to be determined.³⁰ Again, there already a significant level of implementation of pillar Two through domestic legislation of many countries and more to come.

4. CURRENT FORESEEABLE FUTURE OF PILLAR-TWO IMPLEMENTATION

A. Pillar One’s Stagnant State of Affairs

²⁸ <https://pro.bloombergtax.com/brief/beps-the-oecd-taxation-of-the-digital-economy/>.

²⁹ <https://taxfoundation.org/blog/global-tax-agreement/>.

³⁰ <https://www.osler.com/en/resources/regulations/2023/oecd-releases-third-administrative-guidance-on-pillar-two-and-confirms-delay-of-the-pillar-one-time>

The MLI³¹ requires consensus of all Inclusive Framework members on all of the primary objectives, including the removal of members' domestic digital service taxes on MNE gross revenues derived from digital services so as to levy one uniform digital sales tax on digital services.³² 85 jurisdictions (of the approximately 140 currently that are included within the Inclusive Framework) have ratified, accepted, or approved the MLI, covering around 1,900 bilateral tax treaties.³³ Existing digital sales taxes ("DSTs") range from 1% to 30% of an MNE's gross revenues, which is partially explored below.³⁴ A vast difference from one jurisdiction to another. Other jurisdictions have elected to agree to a standstill from imposing new DST legislation until December 31, 2024.³⁵ Canada, amongst at least seven (7) other countries,³⁶ have refused to consent to a further standstill, but remain supportive of the MLI.³⁷ Some of these same countries, as well as the United States, have agreed that any revenues from DSTs in excess of the amount that would be paid under pillar Two will be refunded (currently set to expire June of 2024).³⁸ Currently, approximately 38 countries have enacted or proposed to enact a DST,³⁹ with 18

³¹ See draft at <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>

³² [International tax reform: Multilateral Convention to Implement Amount A of Pillar One - OECD](#)

³³ <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>

³⁴ See interactive chart at <https://bipartisanpolicy.org/blog/taxation-in-the-digital-economy-digital-services-taxes-pillar-one-and-the-path-forward/>.

³⁵ <https://www.pwc.com/ca/en/services/tax/publications/tax-insights/digital-services-tax-potential-implementation-2023.html#:~:text=More%20specifically%2C%20they%20have%20generally,least%2060%25%20of%20the%20Ultimate>

³⁶ <https://www.osler.com/en/resources/regulations/2023/fall-economic-statement-2023#:~:text=The%20Pillar%20Two%20global%20minimum,same%20jurisdiction%20as%20the%20entity>

³⁷ <https://www.pwc.com/ca/en/services/tax/publications/tax-insights/digital-services-tax-potential-implementation-2023.html#:~:text=More%20specifically%2C%20they%20have%20generally,least%2060%25%20of%20the%20Ultimate>

³⁸ <https://crsreports.congress.gov/product/pdf/R/R47988>.

³⁹ <https://bipartisanpolicy.org/blog/taxation-in-the-digital-economy-digital-services-taxes-pillar-one-and-the-path-forward/>

countries having implemented unilateral DSTs.⁴⁰ Canada will now be joining that list with their own proposed digital services tax.

1. Canada

Despite ratifying the MLI⁴¹, Canada introduced Bill C-59, which under Part 2 includes a revised version of the *Digital Services Tax Act* (“DSTA”), which will impose a 3% DST.⁴² Commentary suggests this is a backstop to future failed negotiations to reach consensus on the MLI.⁴³ In line with the GloBE Rules, the threshold requires the MNE earning EURO 750 million on all sources of digital services revenues and CAD 20 million or more of Canadian digital services revenues earned from customers located in Canada, including online marketplace services, online advertising services, and social media services.⁴⁴ The intention is to backdate the implementation to 2022 when the DSTA comes into force (likely in 2024).

Circling back to the primary objective of combating tax-base erosion and profit shifting caused by MNEs, it is contemplated that Canada’s DSTA when implemented will hit big tech giants, such as Apple (previously discussed), for the income earned in Canada but that currently isn’t taxed here.⁴⁵ Again, this will include a retroactive application. Criticisms of Canada’s DSTA include the concerns with a retroactive application to 2022 without ability to credit the DSTA

⁴⁰ <https://taxfoundation.org/research/all/global/digital-taxation/>.

⁴¹ <https://www.oecd.org/ctp/treaties/beps-mli-signatories-and-parties.pdf>

⁴² https://fin.canada.ca/drleg-apl/2021/bia-leb-1221-1-n-eng.html#_Toc95312030

⁴³ <https://www.osler.com/en/resources/regulations/2023/oecd-releases-third-administrative-guidance-on-pillar-two-and-confirms-delay-of-the-pillar-one-time-l>

⁴⁴ <https://www.bdo.ca/insights/canadas-digital-services-tax-are-your-digital-services-caught-in-the-net#:~:text=The%20DST%20is%20intended%20to,for%20the%20DST%20to%20apply.>

⁴⁵ <https://9to5mac.com/2024/04/17/canada-digital-services-tax/>

against income taxes payable, resulting in double taxation.⁴⁶ Complainants include the USA and tech companies alike given their global reach and global GDP figures discussed below.

2. United States of America

The United States is the most reluctant to endorse a policy whereby profits from MNEs were reallocated to market countries through their taxing rights, citing discrimination as the basis.⁴⁷ As of March 2023, the US Treasury Department is renegotiating the definition of DST with the OECD and the scope of the original pillar One draft.⁴⁸ Unfortunately, without the United States approving pillar One, this initiative is likely to fail. This is because most of the affected MNEs are from the United States.⁴⁹ The United States shares 24.4% of the world's GDP, with approximately 31 US firms who would make up 56% of the pillar One Amount A.⁵⁰ I understand that their concerns stem from the likelihood of double taxation, and how to create uniformity on the scope of how DSTs are levied.⁵¹ Further concerns raised include that this will likely create revenue losses to the United States with the reallocation of taxing rights, and increased taxed on US firms, specifically MNEs.⁵²

⁴⁶ <https://www.osler.com/en/resources/regulations/2023/implementation-bill-for-variety-of-canadian-tax-measures-introduced#6>

⁴⁷ <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

⁴⁸ <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>.

⁴⁹ <https://crsreports.congress.gov/product/pdf/R/R47988>

⁵⁰ <https://crsreports.congress.gov/product/pdf/R/R47988>.

⁵¹ <https://pro.bloombergtax.com/brief/understanding-digital-services-taxes-the-oecd/>.

⁵² <https://crsreports.congress.gov/product/pdf/R/R47988>.

The obvious conclusion here that continues to be a thread throughout the Two-Pillar initiative, is that cooperation from major players, like the United States who produce a large source of digital services, is necessary for adequate implementation of a global minimum tax.

3. United Kingdom

In 2017 the United Kingdom signed the MLI, then in 2018 ratified the MLI. Despite this, in contrast to Australia, the United Kingdom is amongst the seven countries who have continued to administer their own DST⁵³ on revenues derived from its citizens on social media platforms, search engines, and online marketplaces.⁵⁴ Currently, the tax rate is 2% on such revenues.⁵⁵ Unlike Canada, and not following the GloBE Rules, the threshold in the United Kingdom is an MNE must have global revenues of EURO 500 million and UK revenues of more than EURO 25 million. The United Kingdom is a country proactively legislating and creating draft legislation to resolve issues related to digital assets⁵⁶ and digital services. A comprehensive Manual defining the scope of the tax, formulas to assist in calculating the DTS liability, and a compliance framework has been provided.⁵⁷ Interestingly, a UK user is defined to include an individual who is “normally” located in the UK, and this “may be different to where the user is located at the time of the transaction.”⁵⁸ This appears to extend the scope of the source jurisdiction to lay claim to taxing these revenues.

⁵³ https://assets.publishing.service.gov.uk/media/5d2719c2e5274a5856aeeefa/Digital_services_tax.pdf.

⁵⁴ <https://www.gov.uk/guidance/check-if-you-need-to-register-for-digital-services-tax#:~:text=Digital%20Services%20Tax%20is%20a,search%20engines%20and%20online%20marketplaces>.

⁵⁵ <https://bipartisanpolicy.org/blog/taxation-in-the-digital-economy-digital-services-taxes-pillar-one-and-the-path-forward/>

⁵⁶ See *Financial Services and Markets Act 2023*, <https://www.legislation.gov.uk/ukpga/2023/29/contents>.

⁵⁷ <https://www.gov.uk/hmrc-internal-manuals/digital-services-tax>

⁵⁸ <https://www.gov.uk/guidance/check-if-you-need-to-register-for-digital-services-tax#:~:text=Digital%20Services%20Tax%20is%20a,search%20engines%20and%20online%20marketplaces>.

Although administering their own DTS, the United Kingdom is “committed to repealing the DST when an appropriate international agreement is reached on the taxation of the digitalization of the economy.”⁵⁹ At a minimum, it will be reviewed in 2025. As stated previously, the United Kingdom has agreed that any revenues from the DST in excess of the amount that would be paid under pillar Two will be refunded (currently set to expire June of 2024).⁶⁰ This is an example of the level of cooperation necessary at the international level to resolve the BEPS issue.

4. Australia

In 2017 Australia signed the MLI, then in 2018 ratified the MLI. It came into force in Australia on January 1, 2019.⁶¹ Since then, Australia has stated they will continue with their ongoing commitment to engaging in a multilateral process, i.e. continue negotiating the MLI, and “not proceed with an interim measure, such as a digital services tax.”⁶² That position has not waived. As a result, the MLI has since “modified several of Australia’s bilateral tax treaties.”⁶³ Australia did, however, back in 2022 propose legislation requiring electronic distribution platform operators to inform the ATO of transactions that were facilitated through their respective platforms.⁶⁴ There have been no further approvals or rejections of this proposed legislation.

Australia does, however, administer a flat rate 10% GST on cross-border supply by foreign entities / non-residents of digital products and services to Australian consumers.⁶⁵

⁵⁹ <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>

⁶⁰ <https://crsreports.congress.gov/product/pdf/R/R47988>.

⁶¹ <https://treasury.gov.au/tax-treaties/multilateral-instrument>

⁶² <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/government-response-digital-economy-consultation>

⁶³ <https://treasury.gov.au/tax-treaties/multilateral-instrument>

⁶⁴ <https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2023/digitalized-economy-taxation-developments-summary.pdf>

⁶⁵ <https://taxsummaries.pwc.com/australia/corporate/other-taxes>

B. Pillar Two's Current Implementation

In contrast to pillar One that cannot proceed to implementation without approval from major GDP jurisdictions such as the United States, pillar Two can be, and has been, adopted and implemented at a domestic level through legislation reflecting the GloBE Rules. Currently approximately 37 countries have introduced draft legislation, and an additional 13 jurisdictions intend to implement pillar Two domestic legislation.⁶⁶ This is a far cry from the 135 countries who agreed to implement the Two-Pillar initiative. For example, the United States remains the most reluctant to progress with implementing pillar Two (in addition to pillar One).

1. Canada

Canada, as a member of the Inclusive Framework, has committed to the introduction of a global minimum tax, at a rate of 15% on undertaxed income of international MNEs earning with annual revenue of EUR 750 million, or more in at least two of the four fiscal years immediately preceding the particular fiscal year.⁶⁷ Essentially, this is a “top-up” tax which increases the effective tax rate up to 15% in a low-tax jurisdiction where an MNE operates.⁶⁸ This is accomplished through the legislating of domestic law, referred to as the *Global Minimum Tax Act*⁶⁹ (“GMTA”), which essentially involves an interplay of three rules largely modeled off the GloBE

⁶⁶ <https://taxfoundation.org/blog/global-tax-agreement/>.

⁶⁷ <https://www.osler.com/en/resources/regulations/2023/draft-canadian-pillar-two-global-minimum-tax-legislation-and-revised-dst-legislation>

⁶⁸ <https://www.osler.com/en/resources/regulations/2021/oecd-releases-model-rules-for-global-minimum-tax>

⁶⁹ <https://fin.canada.ca/drleg-apl/2023/ita-lir-0823-l-4-eng.pdf>

Rules. The QDMTT (GMTA – Part IV) which is used to fill the tax gap charged by the low-tax jurisdiction, followed by the IIR (GMTA – Part II) which imposes the liability to pay the top-up tax on the highest level parent company of an MNE, and lastly, the UTPR (GMTA – Part III) which applies to any residual top-up tax not paid under the IIR.⁷⁰ In addition, it includes the use of one treaty based rule, Subject to Tax Rule (“STTR”), applicable to income taxed at a rate below the agreed upon minimum tax rate of 9%.⁷¹ The STTR was developed in the GloBE Rules as a set of rules applicable under a tax treaty to provide jurisdictions with a right to “tax back” where a payment is subject to low tax or there has been refusal or a source State has ceded to tax by the source jurisdiction.⁷² It is expected that the GMTA will be enacted into Canadian law in 2024, with a retroactive application to December 31, 2023.⁷³

Criticisms of Canada’s GMTA include: 1. Canada did not adopt the GloBE Rules structure, and only substance, 2. GloBE commentary and administrative guidance into the legislation which are not expressly stated in the GloBE Rules, and 3. The GMTA is drafted off of Canadian drafting conventions rather than utilizing the language of the GloBE Rule, which can risk translation or interpretation errors when incorporated in another jurisdiction. This highlights one of the greatest shortfalls of a system requiring domestic implementation of a global set of rules, inconsistency.

2. United States of America

⁷⁰ https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3972&context=scholarly_works

⁷¹ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

⁷² <https://www.oecd-ilibrary.org/docserver/9afd6856-en.pdf?expires=1716160693&id=id&accname=guest&checksum=6C49C08DFD8E17CC276BA6392217F08B>.

⁷³ <https://www.osler.com/osler/media/Osler/Content/PDFs/Letter-to-Department-of-Finance-dated-September-29-2023-GMTA-Consultation.pdf>.

Currently, despite the US Congress and Biden Administration alleging to be supportive of the agreement to set a minimum global tax rate, has chosen to not implement a domestic global minimum tax for MNEs inline with the GloBE Rules. Further, there has been a Bill presented by the Republicans called the *Defending American Jobs and Investment Act*, which would create a reciprocal tax on foreign countries who impose “unfair taxes” on US MNEs under the OECD tax agreement. The premise of the Bill is to “send a clear warning to any nation tempted to exploit the success of our workers and businesses for its own gain... we will not stand idly by while other countries use the OECD global tax deal to extract over \$120 billion in U.S. tax revenue over the next decade.”⁷⁴ It is their position that the Biden Administration has “played right into China’s hands with an OECD global tax deal that shifts jobs and tax revenues out of the United States,” and therefore, the proposed pillar Two is discriminatory and unfairly aimed at American MNEs and takes away from their tax sovereignty.⁷⁵

3. United Kingdom

The United Kingdom was proactive in implementing a temporary DST on the premise that they would move towards implementing the agreed upon 15% global minimum tax on MNEs.⁷⁶ In 2023 the HMRC had published draft guidance on the Multinational Top-up Tax and Domestic Top-up Tax.⁷⁷ Upon receiving royal assent on February 22, 2024, the *Finance Act 2024*,⁷⁸

⁷⁴ <https://waysandmeans.house.gov/ways-and-means-republicans-introduce-bill-to-combat-bidens-global-tax-surrender/>.

⁷⁵ <https://waysandmeans.house.gov/ways-and-means-republicans-introduce-bill-to-combat-bidens-global-tax-surrender/>.

⁷⁶ <https://www.gov.uk/government/news/uk-agrees-transition-toward-new-global-tax-system>.

⁷⁷ See https://assets.publishing.service.gov.uk/media/6582be46ed3c3400133bfc2b/Draft_guidance_on_multinational_top-up_tax_and_domestic_top-up_tax.odt.

⁷⁸ <https://www.legislation.gov.uk/ukpga/2024/3/schedule/12/enacted>.

implemented a multinational and domestic top-up tax under Schedule 12 (which amended the prior version to ensure consistency with the OECD GloBE Rules.⁷⁹

4. Australia

In May of 2023, the Australian Federal Government announced that it would implement legislation to enact a 15% global minimum tax for large MNEs and a domestic minimum tax.⁸⁰ Such legislation is based on the GloBE Rules drafting. It incorporates the imposition of an IIR, UTPR and QDMTT.⁸¹ The Government has sought public consultation on the draft primary and subordinate legislation on that which was released on March 21, 2024.⁸² A total of 25 consultations with the Australian Tax Authority (“ATO”) have been undertaken. The draft legislation currently being reviewed includes an Imposition Bill to impose the tax payable, an Assessment Bill to establish liability and framework for the taxes, and a Consequential Amendments Bill with miscellaneous provisions related to the administration of the taxes.⁸³ Submissions on the current draft of materials was due to the Treasury on April 16, 2024.⁸⁴

5. CONCLUSION

Conclusion?

⁷⁹ <https://orbitax.com/news/archive.php/UK-Enacts-Finance-Act-2024-Inc-55069>.

⁸⁰ <https://www.ato.gov.au/about-ato/new-legislation/in-detail/international/implementation-of-a-global-minimum-tax-and-a-domestic-minimum-tax>

⁸¹ For detailed explanation of the operations see <https://globaltaxnews.ey.com/news/2024-0694-australian-15-percent-global-and-domestic-minimum-taxes-draft-law-released#:~:text=Consistent%20with%20the%20Government's%20announcement,or%20after%201%20January%202025>

⁸² <https://globaltaxnews.ey.com/news/2024-0694-australian-15-percent-global-and-domestic-minimum-taxes-draft-law-released#:~:text=Consistent%20with%20the%20Government's%20announcement,or%20after%201%20January%202025>

⁸³ <https://treasury.gov.au/consultation/c2024-503150-primary>

⁸⁴ <https://treasury.gov.au/consultation/c2024-503150-primary>

Globalization – requires review of how we administer taxes.
Borderless commerce. BNEs.

Imperative to have a global minimum tax – because this ensures consistency in administration and provides countries who's users are consuming good or services, specifically digital, taxing rights on those revenues, ultimately supporting the tax base of those countries and keeping monies within the borders.

Pillar one is a failure – why? Lack of cooperation by US. Politics. Borders. No legal force to compel a jurisdiction to enact domestic legislation.

Impatience by other countries and no real need to act in good faith with a local DST in place as a backstop.

Pillar Two – has become the focus – because it doesn't require approval from all jurisdictions. In theory, if all countries would buy in, the DST may not be necessary at all. However, this will raise the tax floor up to 15% (CITE Li), even on digital services, which may result in double-taxation issues.

I argue that without willing cooperation from signatory jurisdictions, in the absence of legal force, political agreements aren't worth the paper they are printed on. Where does this leave us? With great uncertainty as to how digital services will be taxed globally going forward. Based upon the global digital economy's reach and revenue generation (currently estimated at 15% of global GDP⁸⁵), it is my position that administration of a consistent global taxation of digital services is imperative. More effort towards cooperating on a minimum taxation of digital services is required as our global economy continues to develop more and more online, however, an issue I find unresolved by my research is how to incentivize MNEs, primarily US based, to pay more taxes to other jurisdictions. Perhaps the only way to incentivize participation is to create barriers, such as banning digital service offering platforms, like China has with Meta.

6. BIBLIOGRAPHY

LEGISLATION

Income Tax Act, RSC 1985, c 1 (5th Supp), subsection 82(1) and section 121.

⁸⁵ <https://www.weforum.org/agenda/2022/08/digital-trust-how-to-unleash-the-trillion-dollar-opportunity-for-our-global-economy/#:~:text=The%20World%20Bank%20estimates%20that,faster%20than%20physical%20world%20GDP.>

SECONDARY MATERIALS: BOOKS

David G Duff & Geoffrey Loomer, *Taxation of Business Organizations in Canada*, 2nd ed (LexisNexis, 2019).

Jinyan Li, Joanne Magee and J. Scott Wilkie *Principles of Canadian Income Tax Law* (Toronto: Thomson Reuters, 2022).

SECONDARY MATERIALS: ELECTRONIC SOURCES

Canada Tax Service, “McCarthy Tetrault Analysis, 82 – Taxable Dividends Received” (03 January 2022) online: Taxnet Pro.

David Sherman’s Notes, “Income Tax Act, 121 – Notes,” online: Taxnet Pro.