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The Global Tax Agreement: Some Truths and Legal Realities

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Introduction

With much pomp and ceremony, it was announced that member jurisdictions of the G20/OECD BEPS Inclusive Framework "agreed to a two-pillar solution to address the tax challenges from the digitalization of the economy" (the "Two-Pillar Agreement")[1] This agreement has been hailed by some as "historic", "momentous", "revolutionary", but criticized by others as "harmful to developing countries", cartelistic power grabbing by a few powerful countries, or neocolonialism.[2] So, is the agreement a cause for celebration or the opposite? What is the chance of the Agreement become real law? In this article, I try to first explain what the two-pillar agreement is and then offer my views on the truths and realities of the Agreement. Readers are invited to draw their own conclusions about the implications and the future of the Agreement.

2. The Two-Pillar Agreement

2.1 "Agreement"

The "agreement" takes the form of a 5-page "statement" and 2-page annex. Pillar One is stated in terms of: scope, nexus, quantum, revenue sourcing, tax base determination, segmentation, marketing and distribution profits safe harbour, elimination of double taxation, tax certainty, Amount B, Administration, unilateral measures, and implementation. Pillar Two is stated in terms of: overall design, rule status, scope, rule design, ETR calculation, minimum rate, carve-outs, other exclusions, simplifications, GILTI co-existence, subject to tax rule (STTR), and implementation. The Annex describes the work needed to implement each pillar and sets out a timeline, including the key milestones for the Inclusive Framework.

2.2 Pillar One

Pillar One has no meaningful title. Even though it was originated from BEPS Action 1 about digital taxation and is the justification for removing unilateral digital services taxes (DSTs), it is not about taxing digital businesses. It is about allocating taxing rights to market jurisdictions over the residual profits of the world's largest 100 or so multinational enterprise (MNE) groups in accordance with a single factor (sales) formula. It can be understood as a turnover-based global corporate tax transposed onto the existing national income tax system.

Taxpayers are limited to MNEs with global turnover above 20 billion euros and profitability above 10%. The turnover threshold may be reduced to 10 billion euros in the future. Extractives and regulated financial services are excluded.

A country (or jurisdiction) has the right to tax an in-scope MNE's residual profit if the MNE has a "special purpose nexus" by deriving at least one million euros in revenue from that country. The threshold is reduced to 250,000 euros if that country has a GDP lower than 40 billion euros. This is the so-called Amount A taxing right. A country also has the right to tax a MNE under Amount B, which is not a new taxing right, but a "new" way of applying the arm's length principle to determining the amount of income earned by in-country baseline marketing and distribution activities (e.g., through a subsidiary or permanent establishment). Sourcing rules are critical, but the Agreement leaves the detailed rules for specific categories of transactions to be developed in the future.

The size of the taxing right of a market country depends on the ratio of sales revenue sourced to that country is of the global revenue. The overall amount of residual profit to be allocated to market countries is 25% of the residual profit of an MNE group. Residual profit is the amount of profit in excess of 10% of revenue. Profit (or loss) of an MNE is determined by reference to financial accounting income on a group basis, with some adjustments.

Because the Pillar One tax intersects with the existing corporate income tax in each participating country, double taxation can arise as a result of the intersection. Furthermore, double taxation can arise from conflicting revenue source rules in applying Amount A rules, as well as coordinating between "surrendering jurisdictions" and market jurisdictions with the new taxing rights over Amount A. Tax disputes will be prevented and resolved through a "tax certainty" process.

To implement Pillar One, a Multilateral Convention (MLC) will be developed and opened for signature in 2022. This Convention "will require all parties to remove all digital services taxes and other relevant similar measures with respect to ALL companies, and to commit not to introduce such measures in the future".

Furthermore, Pillar One will require correlative changes to domestic law, including constitutional law in some countries, to implement the new taxing rights over Amount A. To facilitate consistency among jurisdictions, model rules will be developed and supplemented by commentary that describes the purpose and operation of the model rules. In February 2022, the OECD released draft model rules on revenue sourcing and nexus regarding Amount A. Countries are now free to adapt these model rules to reflect their own constitutional law, legal systems, and domestic considerations and practices for structure and wording of legislation as required, while ensuring implementation is consistent in substance with the agreed technical provisions governing the application of the new taxing rights.

2.3 Pillar Two

Unlike Pillar One that is designed to create new taxing rights, Pillar Two is designed as anti-avoidance and anti-tax competition rules. Pillar Two has two sets of rules: domestic rules known as the "Global anti-Base Erosion" or GloBE regime, and a treaty-based rule.[3]

The GloBE regime consist of two interlocking rules, i.e., an income inclusion rule (IIR), which imposes a top-up tax on a parent corporation in respect of the low-taxed income of a constituent entity, and an undertaxed payment rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not subject to tax under an IIR. The OECD Model Rules change the UTPR into a "undertaxed profit rule" and permit countries to adopt a qualified domestic minimum top-up-tax (QDMTT).

A treaty-based rule is known as the subject to tax rule or STTR) that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate. This tax will be creditable as a covered tax under the GloBE rules.

The GloBE rules will apply to MNEs that meet the 750 million euros threshold as determined by the country-by-country reporting rules. However, countries can apply the IIR to smaller MNEs headquartered in their country, this is what the EU has proposed to do. Government entities, international organizations, non-profit organisations, pension funds or investment funds that are ultimate parent entities of an MNE group or any holding vehicles used by such entities, organizations or funds are not subject to the GloBE rules. There is a five-year exclusion from the application of the GloBE rules for MNEs in the "initial phase of their international activity", which are defined as those MNEs that have a maximum of 50 million eruos of tangible assets abroad and that operate in no more than five other jurisdictions.

A 15% minimum tax rate (ETR) is set to determine if income is low taxed for purposes of the GloBE rules. The ETR is computed on a jurisdictional basis. This computation uses a common definition of covered taxes (typically corporate income taxes) and a tax base determined by reference to financial accounting income of the MNE group (with agreed adjustments consistent with the tax policy objectives of Pillar Two and mechanism to address timing differences).

The GloBE rules provide for two types of carve-outs. One is a formulaic substance carve-out that will exclude an amount of income that is 5% of the carrying value of tangible assets and payroll. This is akin to excluding routine profit measured by 5% of tangible assets and payroll. Another carve-out is a de minimis rule that excludes those jurisdictions where the MNE group has revenues of less than 10 million euros and profits of less than 1 million euros. In addition, international shipping income is excluded.

Implementation of Pillar Two is different from Pillar One. Since the GloBE rules are the main rules and require domestic legislation only, a multilateral convention was considered unnecessary to implement these rules. However, because these rules are modelled on the United States GILTI and BEAT rules, the Agreement emphasizes the need for *co-existence* between GILTI and GloBE rules "to ensure a level playing field". It is interesting to note that the Agreement does not "grandfather" the US GILTI rules and expects the United States to align its GILTI to be consistent with the GLoBE. Also, to ensure a level playing field, countries are expected to follow the common approach and "will implement and administer the rules in a way that is consistent with the outcomes provided for under Pillar Two, including in light of model rules and guidance agreed to by the Inclusive Framework."

The subject to tax rule (STTR) is very different from the GloBE rules. It is a rule to be implemented through amending an existing tax treaty or negotiating a new treaty with developing countries. It must be requested by a developing country. The minimum rate is 9%. The source country's top up tax is limited to the difference between the minimum rate (i.e. 9%) and the tax rate on the payment of interest, royalties and a defined set of other payments.

The October Agreement states that Pillar Two should be brought into law in 2022, to be effective in 2023, with the UTPR coming into effect in 2024. Model GloBE rules, a model treaty provision to give effect to the STTR were to be developed by the end of November 2021 and a multilateral instrument will be developed by mid-2022 to facilitate the implement of the STTR in relevant bilateral treaties.

3. Some Truths about the Agreement

Truth #1: It is a political deal only

The Two-Pillar Agreement is not really an agreement in a legal sense as it has no legal effect, enforceability or durability. It is a "political agreement" that can pave the way for developing legal agreements. In this sense, the Agreement is momentous. Because taxing rights and fiscal sovereignty are intertwined with national economic interests and inter-nation trade and economic relations, it is difficult to reform international tax rules without a political agreement on the broader issues, such as desirable objectives, the main interests served and trade-offs.

The Agreement is not legally binding on any member of the Inclusive Framework. This is true even in countries whose constitution does not require the legislature to ratify an international treaty. Under the constitution of many countries, the executive branch of governments has no authority to commit to the deal as a modification of their legal systems – to effect a delegation of legislative authority to a coalition of willing partners. Under public international law, the term "agreement" has a specific meaning; it may arise from political aspirations and actions by affected countries, but to be an agreement, it must acquire legal existence via the process by which international deals acquire enforceable legal authority".[4] That typically requires more than the governments of affected countries purporting to agree.

The Agreement appears to be politically motivated. For example, portraying large MNEs as the "enemy and the sole culprit for the state of international tax regime appears to be a populist move attempted to camouflage the failure of BEPS to deliver a reform that would make the international tax regime fairer and more legitimate."[5] In recent years, especially during the COVID pandemic, there have been growing demands to tax the rich and wealthy MNEs. Through the Agreement, politicians appear to heed to these demands.

The Agreement can also be viewed as an out-growth of domestic politics. US GILTI rules were first enacted by the Trump Administration as part of "Make America Great Again" election campaign promise and are being reformed by the Biden Administration as part of "Made-in-America Tax Plan" (MIA Tax Plan), which is integral to Biden's "Build Back Better" election campaign. To finance the unprecedent investment in infrastructure and social safety net, the MIA Tax Plan depends on the United States' ability to raise corporate income taxes on MNEs without being undermined by other countries tax policies designed to attract US MNEs. In order to secure other countries' "cooperation" in respect of GILTI, the United States needs to make some concessions to other countries that desire to tax US MNEs' profits based on sales (that is Pillar One). Taxpayers in Europe and other parts of the world demand to tax profitable MNEs, most of them are US firms, through DSTs. Politicians in those countries reacted by supporting Pillar One. Twinning the two pillars together in one Agreement represents the outcome of a political compromise between the United States and other countries, especially European countries. Taxing big businesses is a politically winning proposition, especially during the COVID pandemic as these big businesses made excessive profits while ordinary taxpayers had to live through difficult times.

Income tax policies are always connected to political considerations and democratic processes. However, responding to the annoyance of citizens "is not a matter of high tax policy," and whether politics was a motivating cause for Pillar One or an impediment which needed to be managed is not clear yet.[6]

There is also global politics at play. After 2008-9 financial crisis, many OECD countries have seen increase in the cost of social safety net, a rise in inequality and social unrest, and an expansion of xenophobic nationalism and popularism, resulting in a "retreat from globalization and potentially to war."[7] DSTs imposed by countries in Europe and elsewhere triggered potential US trade sanctions or trade war. These countries would prefer to appease the US to avoid trade wars.[8] There is no surprise that the Agreement was preceded by a G7 deal and then a G20 deal. Including the STTR in Pillar Two is largely motivated to appease developing country members of the Inclusive Framework. Some developing countries recognize that the STTR has little to offer to them and Pillar One tax revenue may be neglectable.

> "I just want to reiterate, especially from the perspective of developing countries, so far in the two-pillar solution, whatever has been agreed is nonbinding — I repeat, nonbinding. Everything is political," Chowdhary said. "So developing countries still have time to really consider whether this agreement, which is going to give them a very, very small amount of money . . . is worth doing in the first place."[9]

Truth #2: A global "consensus" may be largely symbolic

The Agreement represents a "global consensus" in the sense that close to 140 member jurisdictions of the Inclusive Framework "have agreed to it". It is difficult to know how many of these jurisdictions have the necessary technical expertise to fully understand what is in the Agreement, the level of technical complexity required to implement the Agreement, and fiscal impact of the Agreement. Representatives of some developing countries publicly stated that the technical discussions were difficult for them to follow and the data on economic impact on their countries was unclear.[10] Also, these technical people, even if they fully grasp the technical elements, may not have had sufficient time to brief their political leaders before they signed on the deal. Therefore, it is difficult to know if the "consensus" is based on genuine intention and commitment of the participating jurisdictions. It is quite possible that many jurisdictions "agreed to" the deal out of "politeness".[11]

For many developing countries, the revenue/economic impact of Pillar One is unclear or insignificant, especially in comparison to the revenues under a DST. Meanwhile, concerns about the negative impact of Pillar Two on fiscal sovereignty seems to be real.

> "Stripped down to its bare essentials, Pillar Two can be regarded simply as an ultimatum from a few powerful developed countries to the rest of the world to the effect that they must tax the income of resident companies at the agreed minimum tax rate, otherwise the capital-exporting residence countries would do it for them. The minimum tax would effectively limit the ability of developing countries to use tax incentives to attract investment by reducing their tax to an amount less than the minimum tax".[12]

As explained below, Pillar Two is largely to serve the interests of the United States and European countries. It will likely limit the tax policy choices of developing countries and while forcing them to adopt exceedingly complex legislation. It is difficult to believe that developing countries "truly" want to adopt Pillar Two against their own interest. Even if the politicians want to join the "consensus", the law-makers in these countries may not.

Even in some OECD member countries, such as Canada, Pillar Two is considered by some commentators to be inimical to national interests,[13] even though the Minister of Finance stated that Canada supported the Agreement.[14]

In the United States, the Biden Administration's Build Back Better Act modifies the GILTI to be consistent with the Pillar Two's GloBE, [15] but owing to the opposition from the Republicans, its chance of becoming law is slim, at the moment. The US process of implementing Pillar One is even less certain. [16]

Truth # 3: The Global Minimum Tax is the real deal

Even though the Agreement refers to a two-pillar solution and Pillar One and Pillar Two are tied together to reach a political compromise, Pillar Two, especially the GloBE, is the real deal. Pillar One and Pillar Two are not connected in terms of their purposes, technical design or actual implementation. They are not even a "solution" to address the tax challenges arising from the digitalisation of the economy, such as the problem facing market countries in applying the existing permanent establishment test to digital business models as many digital businesses fall outside the scope of Pillar One under the Agreement. The problem of tax competition among countries (or race-to-the-bottom in corporate income tax) and tax planning by MNEs predate the rise of digitalization and is not a new problem. Pillar Two is not about solving problems arising from digitalization or globalization of the economy. Neither pillar deal with issues related to MNEs that are out-of-scope of the pillars.

What the United States really wanted is to ensure that its domestic tax policies are not undermined by other countries and its MNEs are not subject to taxation in other countries under unilateral DSTs. A "stable and predictable international tax regime" is good for US MNEs and good for the United States.[17] This is achieved through prohibiting unilateral DSTs and imposing a global minimum corporate tax rate. Having Pillar Two is key to the United States. Maintaining US dominance in rule-making and driving the process of international tax reform is good for the United States and other OECD countries.

The "only clear winners are the OECD, the rich countries' club, and its secretariat who continue to dominate the international tax regime despite its obvious illegitimacy and past failures."[18] Not only the United States really wants Pillar 2, the EU also want to have Pillar Two for its own reasons. France and Germany, both strong supporters of Pillar 2, had previously tried to push the EU into a debate on minimum taxes in order to reduce the pressure on their high nominal corporate tax rates.[19] Tax competition in EU countries cause high-tax countries, such as France and Germany, to not only lose tax revenues, but also real economic activities to neighbouring states that have lower CIT, lower labour costs, equally skilled workforce and a sufficient public infrastructure. Their concerns with tax competition are not new. Tax competition was the main cause of BEPS, especially Action 5.[20] But, EU countries need to have consensus to stop tax competition and could not reach consensus as some countries were not keen on imposing effective self-restrictions in tax competition. As such, France and Germany and other high-tax EU countries "welcome" the US arms twisting and "offer of trade peace" by conceding not to levy DST in order to have Pillar Two.[21] There was no surprise that EU immediately released its draft directive to align with OECD draft model rules for Pillar Two and went further in scope by including domestic groups. If the draft directive were to be adopted, the GloBE can be an entry into a Common Consolidated Corporate Tax Base (CCCTB) that has been under discussion for the past decade or so.[22]

Truth #4: Pillar One is tiny and stands alone

Pillar One is tiny in terms of its scope, revenue impact and effect in solving the problem of digital taxation. It affects only a small number of MNEs (in-scope MNEs) and a small fraction of their profit. Assuming that the average profitability of in-scope firms is 25%, a 25% reallocation percentage would reallocate no more than 3.75% of corporate profits to market countries.[23] If each of the Inclusive Framework member jurisdictions is entitled to share the taxing right over this amount of profit, the amount of profit taxable in each jurisdiction is tiny for most jurisdictions. Only high-income jurisdictions are likely to gain some meaningful tax revenue under Pillar One. The fact that the United States, one of high-income market jurisdictions, claimed that it would not lose tax revenue under Pillar One[24] explains why other countries won't gain much because Pillar One is about re-distribution of taxing rights, not creation of any new taxing rights overall.

Pillar One has little impact on solving the problem of taxing digital businesses. Firstly, it is unlikely that the United States will adopt Pillar One because of the partisan nature of the US law-making process. If so, there is little point for other countries to adopt Pillar One. Secondly, the United Nations Tax Committee choose to solve the problem confined to the digital economy through Art 12B of the UN Model Convention. Whether or not Article 12B is better than Pillar One, it shows an alternative and may weaken the attractiveness of Pillar One. Thirdly, even if Pillar One were adopted, it will apply only to a limited number of MNEs engaged in remote sales, as most in-scope MNEs have physical presence in market jurisdictions and out-of-scope MNEs engaged in digital businesses are not subject to Pillar One.

The Amount A in Pillar One is really "modest". "A cynic might take the view that the reason the OECD looked to residual profits was to make the allocation to market countries look like more than it is and to make it harder to expand the proposal to a broader group of companies".[25] "Irrespective of the allocation method, the small ambition of Pillar One is striking"![26] Nigeria refused to sign on to the Agreement on the ground that it would not be better off under Pillar One than under a unilateral DST. The fact that DSTs are being imposed or proposed in many countries shows that market countries want to tax digital business. The claim that the entire economy is digitalized and it is impossible to ring-fence the digital economy from the rest of the economy for tax purposes is not very convincing. By removing automated digital services and consumer-facing businesses as targeted businesses under Pillar One effectively takes away market countries' power to levy DSTs while not giving them the equivalent tax base. This is disingenuous. As such, "the agreement completely disregards the focus of the post-BEPS work on the digital economy".[27]

The Agreement gives the impression that the two pillars constitute a package to address the tax challenges arising in a digitalized economy. After all, it is an out-growth of BEPS Action 1 designed to address tax challenges arising in a digital economy. The two pillars are also apparently negotiated as part of the "compromise" and "trade-off" between the United States and other countries. However, Pillar One stands alone in respect of the methods of implementation and the chance of being adopted into law. While the signs of adopting Pillar Two are clear, that is, the US already has GILTI, the EU has published a proposed directive to incorporate Pillar 2 into EU law, some other jurisdictions may make sure their corporate ETR is at least 15%, there are no clear signs that the US can adopt Pillar One. On the contrary, Canada has decided to introduce unilateral DST in case Pillar One fails, and several countries continue to levy DSTs under a compromise arrangement with the United States before Pillar One becomes law. The need for revenue from taxing digital businesses and lack of confidence in the implementation of Pillar One are likely the main reasons for this development.

The technical design of Pillar One involves many fundamental and hard-to-solve legal issues that are discussed in more detail in Part 4 of this paper. Therefore, Pillar One appears to be quite unsteady.[28]

Truth #5: Neither pillar is really about digital economy

As mentioned already, Pillar Two is not about digitalized economy. Pillar One does little to address the fundamental challenges facing the international tax system. One is the traditional physical-presence test in the PE definition is ill-fit for remote businesses or any business that can employ local agents as "captive" and leave no business profits in the market country. Examples are traditional services businesses, such as entertainment, travel, insurance and re-insurance, freight and logistics, airlines and shipping, tele-communications and international capital markets. The new digital business models extend this list to taxi, IT and services of almost every kind. (BEPS Action 1). Pillar One does not address the PE problem, but introduces a sales-based nexus applicable only to a small number of large MNEs. Therefore, Pillar One can been seen as a "band-aid" solution to a serious problem.

Another fundamental challenge is transfer pricing. Applying the arm's length principle in accordance with the OECD Transfer Pricing Guidelines is exceedingly complex. In some cases involving intangibles or group synergetic benefits, the application relies on the use of hypotheticals which are close to fictions. Pillar One's formulary apportionment method for Amount A is an excellent step in the right direction in addressing this problem, but it is applied in addition to the existing transfer pricing rules, not instead of them. Moreover, since most, if not all, of the largest 100 MNEs that are potentially in-scope of Pillar One have physical presence in major market countries, Amount B is important. But, the Agreement has only a short paragraph about Amount B:

> The application of the arm's length principle to in-country baseline marketing and distribution activities will be simplified and streamlined, with a particular focus on the needs of low capacity countries. This work will be completed by the end of 2022.

This statement about "simplification" and "streamlining", not about solving the core problem. There is nothing about allocating intangible or residual profit or group synergetic profit, which is earned, presumably, by all members of the MNE group.

At a more basic level, digitalization of the global economy contributes to the worsening of inequity between nations or the so-called South-North problem.[29] There is nothing in the Agreement to address this "digital divide". To the contrary, there are reasons to think that both pillars further the interests of developed countries and the Agreement represents a new form of colonization.[30]

Truth # 6: There are few new tax ideas, but significant constraints on tax sovereignty

The Agreement is "innovative" in the manner it was reached, that is a multilateral process, led by the OECD and backed by the G20. It is a top-down approach. Previously, changes to international tax rules were made bottom-up, typically originated in the United States or other OECD countries, and emulated by other countries out of their own best interests.[31] The League of Nations (predecessor of the United Nations) developed model bilateral tax treaties as opposed to mandatory multilateral conventions or model domestic tax rules. The OECD and UN continue to rely on model bilateral treaties to influence international tax development. The OECD has also published "soft laws" in the form of, among others, Commentaries on the model treaty, guidelines on the application of the arm's length principle. The G20/OECD led Base Erosion and Profit Shifting (BEPS) Project (2013-2015) was the world's first multilateral process for devising specific rules (mostly anti-avoidance rules) for countries to adopt, introducing a peer-review process for monitoring implementation, and a public international law instrument to speedily amend bilateral tax treaties (i.e. the MLI). The two-pillar Agreement extends this multilateral process to creating new, universal substantive tax rules for countries to follow and a multilateral tax convention to redistribute taxing rights.

However, in terms of ideas about international taxation, the two-pillar Agreement has no new ideas. Pillar One is based on the idea of formulary appointment based on sales that has been implemented in the United States since the 1930s.[32] The notion of "residual profit" has been used in transfer pricing since the mid-1990s. Pillar Two is based on the idea that underlies the controlled foreign corporations (CFC) rules that were enacted in the United States in the 1960s and the "harmful tax competition" initiative adopted by the OECD in the late 1990s and reflected in BEPS Action 5.

Arguably, Pillar Two undermines the value-creation principle that is the bedrock of the BEPS project or BEPS 1.0 (2013-2015). Pillar Two gives the taxing right to the MNE group's ultimate parent entity's headquarter country, regardless of any contribution of such country in creating the value and profit that is low-taxed. In other words, Pillar Two assumes the headquarter country is entitled to tax the profit earned in another country.[33]

On the other hand, with respect to limiting tax sovereignty, the Agreement breaks new ground in at least three ways: (1) It mandates "universal rules" be adopted by countries, irrespective of differences in their legal culture or economic and fiscal interests. (2) It contains a moratorium on the imposition of DSTs. (3) The Agreement treats "taxing rights" as "trade-able" between countries. This is particularly true in the case of Pillar Two, which allows one country to "tax back" profits where other countries have not sufficiently exercised their primary taxing rights. Such taxing back was not contemplated by the international tax regime during the era of the League of Nations and was limited to passive or mobile income under the CFC rules. Pillar Two now extends this to active business income that has a closer affiliation with the value-creation jurisdiction. Pillar Two allows industrialized states to curb developing countries from using tax incentives to attract foreign investment.

Truth # 7: The “flawed” existing international tax regime remains intact

The Agreement superimposes the pillars onto the existing corporate income tax system, thus leaving the existing and “flawed” international tax system largely unchanged. For example, the deficiencies in applying the permanent establishment nexus to remote businesses remain. The difficulties in applying the transfer pricing methods to global businesses, especially intangible income or synergetic gains, are not addressed by either Pillars explicitly, although the Amount B element of Pillar One may reduce some complexity for some developing countries and Pillar Two may reduce the incentives for in-scope MNEs to use transfer pricing strategies to shift income offshore. Outside the scope of Pillar One and Pillar Two, these difficulties remain.

In the event of the two pillars collapse, there may be a chance for the international tax regime to evolve from the “rubles of the pillars”.[34] That may be, at the end of the day, the real meaningful impact of the Agreement. It seems very likely that many countries would move on from the traditional idea of nexus based on physical presence to sales-based taxation. Empowered by the normative idea such as the value creation principle adopted in BEPS project and the experience of collecting DSTs in some jurisdictions, many countries may realize that they actually can readily tax remote sellers.

4. Some Legal Realities

Reality #1: No taxation without law

It goes without saying that taxation is a matter of law. A tax can be charged only through domestic law. Conflicting domestic laws are “coordinated” through bilateral or multilateral agreements. Under the rule of law, only the legislature can impose income tax obligations on corporations through legislation. Even in common-law countries, tax law is statutory and there is no judge-made tax law that create tax obligations. The legislature generally uses tax law to implement various key policy objectives, including raising revenue, encouraging economic growth through incentivizing corporate activities and investment, or back-stopping progressive personal income taxation and redistribution of social income.

Reality #2: The Inclusive Framework or the OECD has no taxing powers

The Inclusive Framework is not a supra-national organization that has any taxing power, or any legal power to bind its members. In fact, there is no international organization that has such taxing power. The League of Nations and United Nations were not given any power to levy taxes by their member countries. That is why their role in international taxation is limited to devising model tax conventions for countries’ reference. In 2021, the Group of 77 and China advocated to upgrade the UN Committee of Experts on International Tax Cooperation in Tax Matters to an inter-governmental subsidiary body of the Economic and Social Council (ECOSOC) of the UN.[35] Such proposal is unlikely to be acted upon because of opposition from the United States and OECD countries.

The OECD has played an important role in maintaining the current international tax order by providing international “standards” or guidelines, updating the OECD Model, providing technical expertise to the Inclusive Framework, and mediate the interests of the US and other OECD member countries (especially members of the EU). However, the OECD has no power to introduce tax rules to bind its members, let alone non-members.

The World Trade Organization rules impinge on national policy-markers’ freedom to formulate tax policies that may impede free trade. The WTO Dispute Settlement Body has issued rulings in connection with several disputes over taxes affecting trade (Daly). But, the WTO does not get involved in tax reforms, domestically or internationally.

A main reason for not having any international tax organisation is that countries want to preserve their fiscal autonomy and independence.[36] Taxation is the life-blood of a state. Without fiscal capacity, it is difficult for the state to provide the public goods and services desired by citizens. The diversity in fiscal interests (or spending choices) of various countries makes it impossible to have any international agreement on tax policy or tax law design. That was why no multilateral model convention was developed by the League of Nations in the 1930s. Little has changed since then, in spite of globalization of the economy; the political system that determines the fiscal and tax policies remains nation-based.

Reality #3: A global political deal cannot work without domestic law

Domestic law is the only type of law than can create a tax charge on MNEs. International tax rules are found in domestic tax law and bilateral tax treaties. Because tax treaties only reduce a taxpayer's tax determined under domestic law, tax treaties do not create any tax liability and exclusively "relieving" in nature. In fact, as BEPS Action 6 report shows, tax treaties are often used by taxpayers to avoid tax in both treaty partner countries. Therefore, the "real" international tax rules are found only in domestic law. There is why the implementation of Pillar One or Pillar One requires changes in domestic law.

The Agreement seems to have given the OECD unprecedented power to draft model rules for Pillar Two and Pillar One and provide commentaries. It is unclear how these model rules will be translated into domestic laws and the legal status of these OECD model rules and interpretation guidance. In the case of the model rules for Pillar Two, the OECD has already introduced elements that are not in the Agreement; examples are the undertaxed PROFIT (as opposed to "payment) tax and the QDMTT. In order to make the political deal actually work in practice, it is inevitable that the OECD creates technical rules that can take effect in law. However, the OECD is, in effect, writing tax laws for countries, a power that few countries are willing to cede to the OECD whose officials are not elected by anybody in any country, even OECD member countries.

National corporate tax policies and laws are different for fiscal policy and legal reasons. Countries use tax incentives to encourage certain corporate investment and activities, such as research and development, regional development, and investment in certain sectors, such as oil and gas, or investment in environmental technology.

Corporate income tax law relies on general laws to operate. Different legal systems lead to different corporate tax rules. For example, whether an entity is a corporation is determined by the corporate law, and the validity of corporation transactions is governed by contract law, intellectual property law, and other laws. National laws are different, resulting in different characterization of entities and transactions, or the hybrid entity or instrument problem. Such divergence in general laws is often the basis for tax planning or the cause of the problem of "stateless income". For example, such divergence contributes to the problem of transfer pricing and the difficulty of applying the arm's length principle. A special purpose entity can be created in a tax haven jurisdiction to provide financing or hold valuable intangibles to reduce taxable profit in high-tax jurisdictions. Pillar Two may reduce the seriousness of the problem but cannot fix it.

A fundamental bane of corporate income tax is the legal fiction – each corporation is recognized as a separate legal personality. Pillar One and Pillar Two adopt a group consolidation approach to address this bane. However, reconciling the group approach and the separate entity approach in existing law is not going to be easy.

Reality #4: Divergent national interests have prevented multilateral tax conventions in the past

A new multilateral convention is necessary to implement Pillar One and part of Pillar Two (i.e., the STTR element). However, history has shown that similar multilateral conventions were attempted, but failed, because countries did not cede their tax autonomy to a multilateral convention that could not represent their interests and it was difficult to a multilateral convention that could address diverse national fiscal interests.

Has the digitalization of the economy brought about "standardization" of national fiscal interests and national corporate tax laws? The answer has to be "No". First of all, the US interest in Pillar One is different from that of other countries because the US is the home jurisdiction of in-scope MNEs, stands to "lose" tax revenues while most other countries are predominantly market jurisdictions, and, in theory, could gain some revenues. Canada hedges its bets by asserting its sovereignty – writing its own DST law, but defer to the multilateral agreement if it is implemented.[37] Secondly, developing or capital importing countries have different interests from capital exporting countries. Even among developing countries, there is divergence in corporate tax policies. Some chose not to impose corporate tax and some chose to have high nominal tax rates but offer targeted tax incentives.

Some members of the Inclusive Framework reportedly received "some arm twisting" to join the deal.[38] They may decide to "vote with their feet" when it comes to signing the multilateral convention. This is particularly true when changing domestic tax law through multilateral agreement requires constitutional amendment. Also, there are no promising signs that the United States will sign and ratify the multilateral convention. When Pillar One or Pillar Two is translated into concrete amounts of tax revenues or impact on jobs and economic growth, some countries may realize that they are better off not to be limited by the multilateral convention.

The tight timeline for implementing the pillars is likely to "scare away" some countries. This is exactly what occurred with the BEPS agreements into which some countries were rushed and eventually ignored for most purposes.[39] In the case of Pillar One, one commentator says: "the agreement decimated the magnitude of permissible source taxation by market economies of the largest corporations in the world in comparison to all former proposals by the OECD itself"; any comparison of such an impact would clearly embarrass developing country politicians who may not view that was a problem at the moment when they are pressured by the OECD and the richest countries. However, over time, the numbers will be exposed, and the likely response would be unilateral measures and aggressive interpretations of the agreement".[40]

Ultimately, "rules that restrict countries from acting in their best interests could hurt nations on both ends of the financial spectrum, and the United States stands to lose under a regime that would require it to hand over a portion of its tax base but receive nothing in return."[41]

Reality #5: It is challenging to operate parallel tax systems

Assuming a country adopts Pillar One and/or Pillar Two into domestic law, it will have parallel corporate tax systems: the global system that is based on consolidated financial accounting values and the existing system that is based on taxable income determined for each entity.

In the United States, if the GILTI regime is considered equivalent to Pillar 2's GloBE regime, there will be no parallel as GILTI is part of the domestic law already. In other countries, Pillar 2 will operate in parallel to the existing system. It is not limited to international tax rules, such as CFC rules and transfer pricing rules, but also general domestic corporate tax incentives that affect the computation of ETR. A country like Canada, for example, will need to review its tax incentives for research and development and other activities in order to ensure its ETR is 15% or more so that what Canada gives up by offering tax incentives is not picked up by a corporation's foreign parent's jurisdiction under the Income Inclusion Rule.

For all countries, adopting Pillar One will mean a brand-new taxing system that relies on a new nexus test and global formulaic allocation method for in-scope taxpayers. To the extent that in-scope MNEs have physical presence in a market jurisdiction, the existing rules and Pillar One rules need to be reconciled to prevent double taxation.

Furthermore, every country that adopts both Pillar One and Pillar Two need to figure out how the two tax systems intersect with one another. For example, is Pillar One tax a "covered tax" for computing the ETR under Pillar Two? Can Pillar One tax be credited against the top-up-tax in Pillar Two? Will Pillar One tax be allocated to each jurisdiction before or after the double taxation relief is applied?

Reality # 6: Complexity

There has been a vast body of commentaries on the two pillars and the US GILTI. A universal reaction is complexity. The OECD Model Rules for Pillar Two take up over 70 pages and the OECD Guidance will likely be more lengthy, and that is the case without addressing the STTR element of Pillar Two.

From the perspective of developing countries, the technical complexity is intimidating, overwhelming and the rules are difficult to comprehend. From the perspective of developed countries whose existing tax rules are already exceedingly complex (e.g., the Canadian Income Tax Act has over 1 million words and the print version weighs over 1 kilogram), adding the layers of Pillar One and Pillar Two will make the tax system even more complex.

It is possible that the two Pillars crush under their own weight of complexity and contradictions. The United States GILTI and BEAT were written by the IRS/Treasury tax experts for US taxpayers who pay advisers large sums of money to make sense of and comply with them. The OECD draft model rules are similarly complex. It is hard to see how that model is replicable in many other countries, yet the OECD's model global minimum tax rules are just as complex, if not more so. How can that work for simpler tax systems?[42]

In smaller countries, such as New Zealand, a legitimate question is whether it is worthwhile to bother with implementing either pillar if the additional revenue impact is unclear or insignificant:[43]

> New Zealand's commitment to BEPS 2.0 is a sign that it accepts the OECD arguments around the greater global good. This means the complexity created for some businesses and the potential restrictions on our tax policy choices is considered to be worth it. Similar to New Zealand's embrace of the BEPS 1.0 measures, there is the desire to be a good global citizen and play our part in the expectation that a multilateral approach will be of greatest benefit.
>
> The analysis supporting New Zealand's BEPS 2.0 commitment will be of interest, when released. Inland Revenue's upcoming Long Term Insights Briefing will look at the impact of tax on productivity and the cost of capital. The additional tax that BEPS 2.0 might impose is unlikely to shift the dial on investment decisions. However, the cost of complying might. The BEPS 2.0 rules and their application will be complex, no matter how much simplicity is desired.

Reality #7: Uncertainty

In spite of the efforts of the OECD to ensure "tax certainty", the two pillars have "extraordinary uncertainty".[44] Such uncertainty exists at the level of rule-design, concluding multilateral conventions, transposition of global rules into domestic law, disputes resolution, compliance and administration.

With respect to rule-design, the OECD model rules for Pillar Two are supposed to be template for domestic legislation, but due to the divergence in domestic legislation in close to 140 jurisdictions, it is impossible to be precise and concise. Therefore, uncertainty is built in the process of creating a global template for national laws. There are also uncertainty arising from using financial accounting values for determining tax liability and using novel concepts, such as the new nexus in Pillar One and determination of ETR on a jurisdiction-by-jurisdiction basis for members of a consolidated group.

The multilateral convention on Pillar One and its interaction with existing bilateral tax treaties can be uncertain, especially in respect of Amount B and the dispute prevention and resolution mechanism. More importantly, the timing and ultimate outcome are uncertain at this moment.

> One recalls that the MLI — which simply incorporated previously agreed, BEPS-related treaty changes into a legal instrument — was not opened for signature until more than a year after the BEPS final reports were released. The time needed to draft and reach agreement on the BEPS 2.0 multilateral agreement, which must address many more concerns and develop substantive language largely from scratch, could reasonably be expected to be a multiple of that. Thus, interested parties likely have a few more years to ponder the anticipated intricacies of such an innovative agreement.[45]

Furthermore, in the absence of a multilateral convention or similar public law instrument to enforce a 'common approach" to Pillar Two, it is uncertain about how a common approach is interpreted and enforced, and by whom. It is possible that some countries continue to engage in a race-to-the-bottom tax competition outside Pillar Two (e.g., for smaller MNEs and domestic corporations) while ensuring a 15% ETR for in-scope large MNEs. Is that allowed? What if countries design their QDMTT in a way to formally comply with the common approach, but subsidize MNEs through non-income-tax measures (such as grant or payroll tax or property tax incentives)? If countries' translation of the model rules vary from one another, how will the divergence by managed? If there are tax disputes arising from such divergence, what is the dispute resolution system? There are no answers, yet.

The tax certainty mechanism in Pillar One is full of ambiguities and unrealistic assumptions about the behaviour of taxpayers and tax administration of participating jurisdictions.[46] The ad hoc nature of the mechanism also renders it very uncertain. It is difficult to see how developing countries that have little experience or faith in tax arbitration will trust the tax certainty process.

Conclusion

For anyone interested in international taxation, the current moment is really exciting because we are witnessing a multilateral, open process attempted to transform a century-old regime. The outcomes of this process are not yet clear or certain because the fundamentals that shaped the existing system remain more or less unchanged in the past 100 years: each state is fiscally responsible and accountable to its citizens in its own ways and there is no international government that has the power to impose taxes. Taxing rights are directly translated into revenues to pay for public spending on hospitals, social welfare and national defence, among others. Because Pillar One and Pillar Two distribute taxing rights among jurisdictions and such distribution is, by definition, a zero-sum game, they produce winners and losers among states. Reaching a genuine and legally enforceable global agreement requires participating states to feel that they all win something. Finding a way for each of the 140 jurisdictions to feel that they are a "winner" may be akin to chasing a rainbow.

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[1] See Statement by the Inclusive Framework (Political Agreement) in October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm. For details, see OECD draft Model Rules on Pillar 2, https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm#:~:text=The%20Pillar%20Two%20model%20rules,G20%20Inclusive%20Framework%20on%20BEPS; the United Kingdom consultation paper published in January 2022, https://www.gov.uk/government/consultations/oecd-pillar-2-consultation-on-implementation; EU draft directive: https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf; and OECD, "Public Consultation Document, Pillar One – Amount A: Draft Model Rules for Nexus and Revenue Sourcing" (Feb.4-18, 2022), https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf

[2] For selected commentaries, see Y. Brauner, "Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective" INTERTAX, vol.50, Issue 1, 2022, 2; G.S. Cooper, "Building on the Rubble of Pillar One", *Bulletin for International Taxation,* 2021 (Volume 75), No. 11/12; M. Herzfeld, "Does the OECD Deal Reset The International Economic Order?", Tax Notes Int'l, Dec.20, 2021, 1317; J. Li, "The Legal Challenges of Creating a Global Tax Regime with the OECD Pillar One Blueprint" Bulletin for International Taxation, 2021 (Volume 75), No. 2; S. Wilkie, "Next Steps for the OECD Pillars: Moving from a Political Deal to an Enforceable Law", Tax Notes Int'l, Nov.22, 2021 889-903; S. E. Shay, "The Deceptive Allure of Taxing 'Residual Profits'", *Bulletin for International Taxation,* 2021 (Volume 75), No. 11/12; L.A. Sheppard, "DeFANGed International Taxation" (Part 1 to Part 4) in Tax Notes Federal: Part 1- Mar.1, 2021 1465; Part 2 - Mar. 15, 2021, p. 1659; Part 3 - Oct. 25, 2021, p. 429; and Part 4 - Nov. 1, 2021, p. 603.

[3] See note 1, above.

[4] Wilkie, note 2 above, at 895.

[5] Brauner, note 2.

[6] Cooper, note 2 above, at 5/12.

[7] R. Avi-Yonah, "The International Tax Regime at 100: Reflections on the OECD's BEPS Project", Bulletin for International Taxation, 2021 (Volume 75), No. 11/12 .

[8] W. Cui, "New Puzzles in International Tax Agreements", https://papers.ssrn.com (Jan.18, 2022).

[9] S. S. Johnston, "OECD Pillar 2 Subject-to-Tax Rule Falls Short, Officials Say", Tax Notes, Jan.27, 2022.

[10] Tax Analysts, "The Global Minimum Tax and the Developing World: Transcript", available at Tax Notes International, posted on Feb.2, 2022 (hereinafter the "Transcript").

[11] Brauner, supra note 2; Wilkie, supra note 2.

[12] B.J. Arnold, "The Evolution of Controlled Foreign Corporation Rules and Beyond" 73 Bulletin Int'l Taxation, 12 (2019), at sec.6.2.2; C. Burnett, "Attribution Across Borders – From CFC Rules to Pillar Two" in G. Kofler, R. Mason and A. Rust, eds., *Thinker, Teacher, Traveler: Reimagining International Tax* (IBFD 2021), at 136.

[13] N. Boidman and M.N. Kandev, "Canada at the Crossrods of International Tax Reform: Between Harmonization and Tax Competition", Bulletin for International Taxation, 2021 (Volume 75), No. 11/12; A. Nikolakakis, "Aligning the Location of Taxation with the Location of Value Creation: Are We There Yet?!" Bulletin for International Taxation, 2021 (Volume 75), No. 11/12.

[14] Canada, "Statement by the Deputy Prime Minister on New International Tax Reform Agreement", Oct.8, 2021, https://www.canada.ca/en/department-finance/news/2021/10/statement-by-the-deputy-prime-minister-on-new-international-tax-reform-agreement.html

[15] For an overview of the Build Back Better Act in respect to GILTI, see R.S. Avi-Yonah, "First Impressions of the International Tax Provisions of BBB: A Reasonable Compromise", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956592 (Dec.28, 2021).

[16] American commentators and lawmakers have serious concerns with Pillar One; see M. Helzfeld, "Pushing Pillar 2 Past Congress", Tax Notes Federal, July 19, 2021, 363.

[17] Herzfeld, note 2 above.

[18] Brauner, note 2 above.

[19] J. Hey, "Global Minimum Taxation (GloBE): What Is It About and What Could Be a European Answer?" in Kofler, Mason and Rust, note xx, at 250-251; and L. A. Sheppard, "EU Year in Review 2021: Creeping OECD Convergence", Tax Notes International, Jan.3, 2022, at 11.

[20] Hey, ibid., at 251.

[21] Hey, ibid.

[22] Hey, ibid.

[23] Shay, note 2 above.

[24] S.S. Johnston, "U.S. Pillar 1 Tax Pitch Is Largely Revenue Neutral, Yellen Says", Tax Notes, Jun.9, 2021.

[25] Shay, note 2 above, at 7.

[26] Ibid.

[27] Brauner, note 2 above, at 3.

[28] Li, note 2 above.

[29] See S. Dean and A. Waris, "Ten Truths about Tax Havens: Inclusion and the "Liberia' Problem", Emory Law Journal, Vol. 70, No. 7, 2021, Brooklyn Law School, Legal Studies Paper No. 670, Available at SSRN: https://ssrn.com/abstract=3822421 (UN study).

[30] Brauner, note 2 above.

[31] Avi-Yona, note 2 above; Li, note 2 above.

[32] Avi-Yonah, note 2 above.

[33] Nikolakakis, note 13 above.

[34] Cooper, note 2 above.

[35] See http://www.g77.org/statement/getstatement.php?id=170407b.

[36] M. Herzfeld, "Are Pillars 1 and 2 Compatible with Sovereignty and Democracy?" Tax Notes Federal, Dec.7, 2020, 1557.

[37] Wilkie, note 2 above.

[38] N.A. Sarfo and S.S. Johnston, "A Brave Bet: The Inclusive Framework's High-Stake Future", Tax Notes International, Dec.20, 2021, 1326.

[39] Brauner, note 2 above, at 4.

[40] Brauner, note 2 above, at 4.

[41] M. Herzfeld, “Are Pillars 1 and 2 Compatible with Sovereignty and Democracy?” Tax Notes Federal, Dec.7, 2020, at 1562.

[42] See Burnett, note 12 above, at 138.

[43] D. Elwela, “BEPS 2.0 – The Final Frontier”? KPMG New Zealand, https://home.kpmg/nz/en/home/insights/2021/10/beps-2-0-the-final-frontier.html

[44] W. Schon, “Is There Finally an International Tax System?” in Kofler, Mason and Rust, note 2 above. at 488

[45] M. C. Bennett, “Contemplating a Multilateral Convention to Implement OECD Pillars 1 and 2”, *Tax Notes International,* June 11, 2021.

[46] Sheppard, note 2 above.

关于双支柱方案的全球税收共识：真相探究和法律现实

李金艳*著

陈新#译

Abstract: 本文就关于双支柱方案的全球税收共识的七大事实真相和所涉及的八个法律现实进行探究，供读者参考。

Keywords: 国际税收；双支柱；全球最低税；全球税收共识；G20/OECD 税基侵蚀和利润转移（BEPS）包容性框架

一、引言

伴随着颇多喧嚣和鼓噪，G20/OECD 税基侵蚀和利润转移（BEPS）包容性框架成员对解决经济数字化税收挑战的双支柱方案达成共识（以下简称“双支柱共识”或“共识”）[1] 得到了连篇累牍的新闻报道与专家评论。有的称该共识为“历史性的”“关键性的”，甚而至于是“革命性的”，有的则是 批评其“对发展中国家有害”，是被少数强国攫取的“卡特尔式权力”，或是“新殖民主义”。[2] 那么，这项双支柱共识究竟是值得庆祝，还是恰恰相反？双支柱共识若是要成为真正意义上的法律，可能性有多大？在本文中，笔者试图首先解释何为双支柱共识，然后就其事实真相和法律现实提出看法。读者不妨对这项共识的意义和未来，得出自己的结论。

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[1] 参见 2021 年 10 月包容性框架的声明（政治共识）https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm。关于详细内容，参见 OECD 支柱二规则立法模板 https://www.oecd.org/tax/beps/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm#:~:text=The%20Pillar%20Two%20model%20rules,G20%20Inclusive%20Framework%20on%20BEPS；英国于 2022 年 1 月发布的咨询文件 https://www.gov.uk/government/consultations/oecd-pillar-2-consultation-on-implementation；欧盟指令草案 https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_823_1_EN_ACT_part1_v11.pdf；以及 OECD 公众咨询文件，《支柱一金额 A：联结度和收入来源地立法模板草案》（2022 年 2 月 4—18 日）https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-nexus-revenue-sourcing.pdf。

[2] 关于部分评论性文献，Y. Brauner. Agreement? What Agreement? The 8 October 2021, OECD Statement in Perspective[J]. Intertax,2022,50(1):2；G.S. Cooper. Building on the Rubble of Pillar One[J]. Bulletin for International Taxation, 2021,75(11/12)；M. Herzfeld. Does the OECD Deal Reset the International Economic Order?[J]. Tax Notes Int’l, Dec.20, 2021:1317；J. Li. The Legal Challenges of Creating a Global Tax Regime with the OECD Pillar One Blueprint[J]. Bulletin for International Taxation, 2021,75(2)；S. Wilkie. Next Steps for the OECD Pillars: Moving from a Political Deal to an Enforceable Law[J]. Tax Notes Int’l, Dec 1, 2021:889-903；S. E. Shay. The Deceptive Allure of Taxing “Residual Profits”[J]. Bulletin for International Taxation, 2021,75(11/12)；L.A. Sheppard. De-FANGed International Taxation (Part 1 to Part 4)[J]. Tax Notes Federal, Part 1- Mar.1, 2021:1465; Part 2 - Mar. 15, 2021:1659; Part 3 - Oct. 25, 2021:429; and Part 4 - Nov. 1, 2021:603。

二、双支柱共识

（一）共识简介

从形式上来看，关于双支柱方案达成的共识包含声明（5 页）和附录（2 页）两个部分。支柱一包括：适用范围、联结度、金额、收入来源地、税基的确定、分部核算、营销及分销利润安全港、消除双重征税、税收确定性、金额 B、征管、单边措施和实施。支柱二包括：整体设计、规则效力、适用范围、规则设计、有效税率计算、最低有效税率、排除、其他豁免、简化措施、与全球无形资产低税所得制度（GILTI）并存、应税规则（STTR）和实施。附录主要介绍为实施双支柱方案所需开展的工作，并设定了时间表，包括 BEPS 包容性框架需完成的重要事项。

（二）支柱一

支柱一并无意义明确的标题。尽管支柱一起源于应对数字经济税收挑战的 BEPS 第 1 项行动计划，有取消单边数字服务税（DST）的正当性，但其主旨并非是对数字企业征税。支柱一涉及根据单一因素（销售）公式，向市场管辖区分配全球约 100 家规模最大的跨国企业集团剩余利润的征税权。可以将支柱一理解为移植到各国现有所得税制度之中的一种基于营业额的全球公司税。

在支柱一中，纳税人仅限于全球营业额超过 200 亿欧元、利润率超过 10%的跨国企业。未来，营业额门槛可能会降至 100 亿欧元。采掘业和受监管的金融服务业除外。

一个国家（或管辖区）[3]有权对范围内跨国企业的剩余利润征税，前提是跨国企业从该国取得的收入不低于 100 万欧元，故而存在“特殊目的联结度”。如果一国的国内生产总值低于 400 亿欧元，该收入门槛将降至 25 万欧元。这就是所谓的金额 A 征税权。一国也有权根据金额 B 对跨国企业征税，这不是一种新的征税权，而是一种“新”的方法，即适用独立交易原则来确定国内基本营销和分销活动（如通过子公司或常设机构）取得收入的数额。收入来源地规则至关重要，但针对具体交易类别的详细规则将留待未来再行制定。

市场国征税权的大小取决于来源于该国的销售收入占全球收入的比例。分配给市场国的剩余利润总额为跨国企业集团剩余利润的 25%。剩余利润是超过收入 10%的利润额。跨国企业的利润（或亏损）是根据集团财务会计收入确定的，并进行一些调整。

由于支柱一方案下的税收与每个参与国现有公司所得税存在交叉，可能会产生双重征税。此外，导致双重征税的原因还包括在运用金额 A 规则时，收入来源地规则之间存在抵触，以及“放弃征税权的管辖区”和涉及金额 A 新征税权的市场管辖区之间的协调。由此产生的税收争议将通过税收确定性程序预防和解决。

[3] 下文的国家也包括管辖区。

为了实施支柱一，将拟定一项多边公约（MLC），并于 2022 年开放签署。该公约“将要求所有缔约方取消对所有公司征收的所有数字服务税和其他相关的类似措施，并承诺今后不再引入此类措施”。

此外，支柱一要求对国内法（包括一些国家的宪法）进行相关修订，以实施针对金额 A 的新征税权。为便于在各管辖区之间实现一致性，将制定立法模板，并辅之以注释，描述立法模板之目的和运作机制。2022 年 2 月，OECD 发布了关于金额 A 的收入来源地和联结度的立法模板草案。各国现在可以自行调整这些立法模板，以反映其本国的宪法、法律制度，以及国内对法律结构和措辞的考量和做法，同时确保其具体实施在实质上与制约新征税权运用的既定技术性规定相一致。

（三）支柱二

与支柱一创设新的征税权不同，支柱二旨在制定反避税和反税收竞争规则。支柱二有两套规则：被称为“全球反税基侵蚀（GloBE）”制度的国内法规则，以及基于税收协定的规则。[4]

GloBE 制度由两项紧密联系的规则组成，即收入纳入规则（IIR）和低税支付规则（UTPR）。前者对母公司就成员实体的低税收入征收补足税，后者在成员实体的低税收入未按照 IIR 予以征税时，通过不予扣除或要求进行等额调整的发式征收补足税。UTPR 规则是对 IIT 的支持，在低税利润没有受制于 IIR 时才启动。两个规则的税基的计算是相同的，但有权通过 UTPR 征收补足税的国家可能很多，所以支柱 2 立法模板规定以一雇员人数和有形资产价值为基础的分配共识。

UTPR 英文缩写中的“P” 一直代表“payment” （支付）， 即“低税<u>支付</u>规则。OECD 立法模板改用“profit”（利润）, 变成“低税<u>利润</u>规则。这一改变具有重大意义，因为缴纳补足税的成员实体不需要与低税成员实体有任何交易往来并以此侵蚀所在国的税基。比如, A 国没有 IIR，但英国有 UTPR；A 国的跨国公司在 X 国的子公司的 ETR 为 8%，英国子公司要缴纳 7%的补足税。按照支柱 2 的蓝图，英国子公司只有在对 X 国子公司有侵蚀税基的支付时（如利息）才需缴纳补足税。实质上，UTPR 从一个保护税基的规则变成了一个“抢占”别国税收的手段。

另外，OECD 立法模板超越 2021 年十月共识，允许各国实行合格国内最低补足税（Qualified Domestic Minimum Top-up Tax, QDMTT）。

[4] 同前注 1。

基于税收协定的规则被称为”应税规则” (subject to tax rule or STTR)，其允许来源地管辖区对已按照低于最低税率征税的某些关联方款项支付，征收有限的来源地税收。根据 GloBE 规则，该项税收将作为范围内税收予以抵免。

GloBE 规则适用于按照国别报告规则确定的 7.5 亿欧元门槛的跨国企业。不过，各国可以将 IIR 适用于总部设在本国的较小规模的跨国企业，这是欧盟提议的做法。作为跨国企业集团最终控股实体的政府实体、国际组织、非营利组织、养老基金或投资基金，以及此类实体、组织或基金所使用的任何持股工具（holding vehicles），不适用 GloBE 规则。处于“国际化活动初始阶段”的跨国企业，有五年的时间可以不适用 GloBE 规则，这些跨国企业的定义为，在海外拥有最多 5 000 万欧元有形资产且在其他不超过 5 个管辖区运营。

支柱二将最低有效税率（ETR）设定为 15%，并将其用于确定收入是否属于 GloBE 规则所指意义上的低税收入。ETR 是针对各个管辖区计算的。该计算使用了通常为公司所得税的通用定义,以及按照跨国企业集团财务会计收入确定的税基（并商定进行必要的调整，这些调整与支柱二的税收政策目标相一致，结合了解决时间差异的机制）。

GloBE 规则规定了两种类型的排除。一种是公式化的实质排除，即排除有形资产账面价值和工资的 5%的收入。这类似于将数额为有形资产和工资总额 5%的常规利润排除在外。另一个排除是最低限度规则，即排除适用于跨国企业集团在其中收入低于 1 000 万欧元且利润低于 100 万欧元的管辖区。此外，国际海运收入也不适用支柱二方案。

支柱二的实施不同于支柱一。由于以 GloBE 规则为主，且只需要国内立法，没有必要通过多边公约来实施这些规则。然而，由于这些规则是仿照美国的 GILTI 和税基侵蚀与反滥用税（BEAT）规则制定的，双支柱共识强调 GILTI 规则和 GloBE 规则有必要共存，“以确保竞争环境公平”。有趣的是，双支柱共识没有“特别优待”美国的 GILTI 规则，而是要求美国使其 GILTI 规则与 GloBE 规则保持一致。此外，为确保竞争环境公平，各国应遵循共同的方法，并“以符合支柱二规定结果的方式，实施和管理这些规则，包括遵循包容性框架商定的立法模板和指引。”

应税规则 (STTR)与 GloBE 规则大不相同, 它的实施需要通过修订现行税收协定或者与发展中国家商谈新的协定，且必须由发展中国家发起。最低税率为 9%。来源国的补足税仅限于最低税率（即 9%）与针对利息、特许权使用费和一系列其他款项支付的税率之间的差额。

2021 年 10 月共识提出，支柱二应于 2022 年立法，并于 2023 年生效，UTPR 将于 2024 年生效。GloBE 立法模板本应于 2021 年 11 月底制定，而实际略有延迟，于 12 月 20 日对外发布，并将于 2022 年年中拟定多边工具，以便 STTR 在相关双边协定中得到落实。

三、现实真相

（一）双支柱共识纯属政治意义上的共识

双支柱共识并非法律意义上的协议，因其不具备法律效力、可执行性或持久性。它是一项“政治共识”，可以为制定法律协议铺平道路。从这个意义上说，这项共识非同凡响。由于征税权和财政主权与各国的经济利益以及国家间的贸易和经济关系相互纠缠交织，如果没有就一系列更为广泛的问题达成政治共识，如希望实现的目标、其所服务的主要利益和各种权衡，就很难推动国际税收规则改革。

双支柱共识对包容性框架的任何成员都没有法律约束力。即使在其宪法不要求立法机构批准国际协定的国家，情况也是如此。根据许多国家的宪法，政府的行政部门无权将此等政治行为作为对其法律制度的修订，即将立法权委托给包容性框架。根据国际公法，“协议”一词具有特定含义；它可能源起于置身其中的各个国家的政治愿望和行动，但要成为一项协议，则必须通过一定的程序，使国家间的行为获得可执行的法律权威，进而获得合法的存在。[5] 这通常需要的不仅仅是相关国家政府在口头上表示同意。

也可以将双支柱共识视为国内政治的产物。近年来，特别是在新冠肺炎疫情期间，对富人和利润丰厚的跨国企业征税的呼声越来越高。例如，大型跨国企业被描绘成“国际税收制度现状的罪魁祸首，试图以此粉饰 BEPS 项目未能使国际税收制度更为公平公正、合情合理之现实。”[6]因此，一些国家的政府看起来是在通过双支柱共识，回应民众的这些要求。

从国际关系方面看，双支柱共识政治色彩也很浓。美国的 GILTI 规则最初由特朗普政府提出，是“让美国再度伟大”（Make America Great Again）竞选承诺的一部分；现在拜登政府将其改头换面，纳入“美国制造税收计划”（Made-in-America Tax Plan）中，后者是拜登“重建更好未来”（Build Back Better）竞选活动的组成部分。美国制造税收计划能否成功，一定程度上取决于美国向跨国企业征收所得税的能力，而且这种能力不应被其他国家吸引美国跨国企业的税收政策所影响。为了确保其他国家在 GILTI 规则方面的“合作”，美国需要向一些国家（这些国家希望以销售额为依据，对美国跨国企业利润征税）作出一定程度的让步。欧洲和世界其他地区的纳税人要求通过数字服务税，向利润丰厚的跨国企业（其中大多数是美国公司）征税。由此，这些国家的政界人士的反应是支持支柱一。在一项共识中把这两大支柱结合在一起，代表着美国和其他国家（特别是欧洲国家）之间政治妥协的结果。对大企业征税，在政治上实为大有胜算之举措，尤其是在新冠肺炎疫情期间，这些大企业获利颇丰，而普通纳税人只能艰难度日。

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[5] Wilkie，前注 2，895。

[6] Brauner，前注 2。

全球政治也在发挥作用。2008—2009 年金融危机之后，许多 OECD 成员国的社会安全网络成本纷纷攀升，不平等和社会动荡加剧，民族主义和平民主义呈现扩张之势，导致“全球化退潮，并可能走向战争”。[7]欧洲国家和其他地区国家实施的数字服务税引发了美国潜在的贸易制裁或贸易战。这些国家更愿意平息美国的怒气，以避免发生贸易战。[8]所以，在双支柱共识形成之前，七国集团（G7）和二十国集团（G20）都先后表明支持态度。将 STTR 纳入支柱二主要是为了安抚包容性框架中的发展中国家成员。一些发展中国家已经认识到，STTR 对其并无益处，通过支柱一实现的税收收入可以忽略不计。

（二）全球“共识”在很大程度上可能是象征性的

双支柱共识代表了一种“全球共识”，之所以如此，是因为包容性框架的近 140 个成员管辖区“都已经对其表示赞同”。其实，我们很难知晓，这些管辖区中有多少拥有必要的专门性技术知识，能充分了解该项共识的内容、落实该项共识所需的技术复杂程度，以及该项共识的财税影响。一些发展中国家的代表公开表示，很难跟进相关技术讨论，也不清楚与其国家经济影响相关的数据。[9]

对于许多发展中国家来说，支柱一的税收收入及经济影响并不显而易见，或者说只是微不足道，尤其是与数字服务税下的税收收入相比而言，更是如此。与此同时，对于支柱二在税收主权方面负面影响的担忧，则并非空穴来风。

“归根结底，可以将支柱二简单地视为几个强大的发达国家向世界其他地区发出的最后通牒，要求其必须按照商定的最低税率对居民企业的收入征税，否则作为资本输出国的居民国会代行此事。最低税将有效限制发展中国家利用税收优惠措施吸引投资的能力，如将其税收水平降低至最低税水平以下的做法”。[10]

如下文所述，支柱二主要是为美国和欧洲国家的利益服务。支柱二可能会限制发展中国家的税收政策选择空间，迫使其采用极其复杂的税收法律。很难相信发展中国家“由衷地”愿意违背自身利益，采纳支柱二。

[7] R. S. Avi-Yonah. The International Tax Regime at 100: Reflections on the OECD’s BEPS Project[J]. Bulletin for International Taxation, 2021,75(11/12).

[8] W. Cui. New Puzzles in International Tax Agreements[EB/OL].(2022-01-18)[2022-02-16].https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3877854.

[9] Cara Griffith, Nana Ama Sarfo, Carlos Protto, et al. The Global Minimum Tax and the Developing World: Transcript[J]. Tax Notes International, Feb. 2, 2022 (hereinafter the “Transcript”).

[10] B.J. Arnold. The Evolution of Controlled Foreign Corporation Rules and Beyond[J]. Bulletin for International Taxation,2019,73(12), at sec.6.2.2; C. Burnett. Attribution across Borders – from CFC Rules to Pillar Two[M]//G. Kofler, R. Mason & A. Rust, eds.. Thinker, Teacher, Traveler: Reimagining International Tax. IBFD,2021:136.

即使在一些OECD成员国，如加拿大，尽管其财政部长表示加拿大支持双支柱共识，[11]一些评论人士则认为，支柱二不利于国家利益。[12]

在美国，拜登政府的“重建美好未来”法案修改了GILTI，使其与支柱二的GloBE规则保持一致，[13]但由于共和党人的反对，目前其成为法律的可能性渺茫。美国实施支柱一的进程就更不确定了。[14]

（三）全球最低税才是欧美更需要的

尽管双支柱共识事关“两个支柱”，并且将支柱一和支柱二捆绑起来才能达成政治性妥协，但是支柱二，尤其是 GloBE 规则，才是要害所在。支柱一和支柱二在目的、技术设计或实际实施方面并没有联系。它们甚至并未成为应对经济数字化税收挑战的“解决方案”。如并未解决将现有常设机构测试运用于数字商业模式时面临的问题，因为许多数字企业不属于双支柱共识下支柱一的范围。各个国家之间的税收竞争（或者说公司所得税的逐底竞争）和跨国企业的税收筹划问题早在数字化兴起之前就出现了，并非新问题。支柱二并非着眼于解决经济数字化或全球化带来的问题。这两大支柱都没有触及落入“双支柱”方案范围以外的跨国企业的有关问题。

美国真正想要实现的目标在于，确保其国内税收政策不受其他国家阻挠或干扰，其跨国企业不受其他国家单方面数字服务税征收的影响。“稳定且可预测的国际税收制度”对美国跨国企业和美国都有好处。[15]这一目标可以通过叫停单边数字服务税和实施全球最低公司税来实现。实现支柱二对美国而言至关重要。保持美国在规则制定和国际税收改革进程推动方面的主导地位，对美国和其他 OECD 成员国都大有裨益。

“唯一显而易见的赢家是富国俱乐部OECD及其秘书处，尽管其明显不具有相关合法地位，并且在过去曾多次失败，但 OECD 仍继续主导着国际税收制度。”[16]不仅美国确实希望实现支柱二，欧盟也出于其自身原因而乐见其成。法国和德国都是支柱二的坚定支持者，此前都曾试图推动欧盟就最低税展开辩论，以减轻其较高公司所得税名义税率所承受

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[11] Department of Finance Canada. Statement by the Deputy Prime Minister on New International Tax Reform Agreement[EB/OL].(2021-10-08)[2022-02-13]. https://www.canada.ca/en/department-finance/news/2021/10/statement-by-the-deputy-prime-minister-on-new-international-tax-reform-agreement.html.

[12] N. Boidman & M.N. Kandev. Canada at the Crossroads of International Tax Reform: Between Harmonization and Tax Competition[J]. Bulletin for International Taxation,2021,75(11/12); A. Nikolakakis. Aligning the Location of Taxation with the Location of Value Creation: Are We There Yet?![J]. Bulletin for International Taxation,2021,75(11/12).

[13] 关于“重建美好未来”法案涉及 GILTI 方面内容的概述，R.S. Avi-Yonah. First Impressions of the International Tax Provisions of BBB: A Reasonable Compromise[EB/OL].(2021-12-28)[2022-02-13].https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956592.

[14] 美国评论人士和立法者极为关注支柱一；M. Helzfeld. Pushing Pillar 2 Past Congress[J]. Tax Notes Federal, July 19, 2021, 363.

[15] Herzfeld，前注 2。

[16] Brauner，前注 2。

的压力。[17]欧盟成员国中存在的税收竞争导致法国和德国等高税收国家税收收入流失，实际经济活动受损，公司所得税税率较低、劳动力成本较低、劳动力技能相同、公共基础设施充裕的邻国则从中获益。它们对税收竞争的担忧并非新生事物。税收竞争是 BEPS 项目，尤其是第 5 项行动计划的主要原因。[18]然而，欧盟成员国需要达成共识来停止税收竞争，却又无力达成，个中缘由在于一些国家并不热衷于"自我约束"税收竞争。因此，法国、德国和其他高税收的欧盟成员国"乐意于"借助美国的力量，"提议实现贸易和平"，答应不再征收数字服务税，从而实现支柱二。[19]所以，共识达成后，欧盟立即发布了指令草案，与 OECD 支柱二立法模板草案保持一致，并在范围方面更进一步，将国内集团纳入其中。如果该指令草案获得通过，GloBE 规则可望被纳入共同合并公司税基（CCCTB）之中。[20]

（四）支柱一微不足道且孤立无援

就其范围、对于税收收入的影响和在解决数字税收问题方面的作用而言，支柱一都毫不起眼。支柱一只影响少量跨国企业（即范围内跨国企业）及其利润的一小部分。假设范围内公司的平均利润率为 25%，25%的再分配比例仅将不超过 3.75%的公司利润再分配给市场国。[21]如果包容性框架的每个成员管辖区都有资格分享针对该利润数额的征税权，那么对于大多数管辖区来说，其获得的应税利润数额极小。只有高收入的管辖区才有可能依据支柱一获得稍多一些的税收收入。作为高收入市场管辖区之一的美国声称，在支柱一下，其不会损失税收收入；[22]这一事实解释了为什么其他国家不会获得太多收益，因为支柱一事关重新分配征税权，而不是创造任何新的征税权。

支柱一对解决数字企业征税问题几乎没有影响。首先，由于美国立法过程的党派性质，美国不太可能正式通过支柱一。若确实如此，其他国家接纳支柱一就没有什么意义了。其次，联合国税收委员会决定借助于联合国协定范本第 12B 条来解决数字经济领域中的相关问题。无论第 12B 条是否优于支柱一，它都可以成为一种备选方案，由此可能削弱支柱一的吸引力。再次，即使支柱一获得采纳，它也只适用于从事远程销售的少量跨国企业，因为大多数范围内跨国企业在市场管辖区都有实际存在，而从事数字业务的范围外跨国企业却又不受支柱一的约束。

支柱一中的金额 A 的实际意义确实"不值得一提"。"持怀疑态度的人士可能会认为，OECD 之所以着眼于剩余利润，是为了让对于市场国的分配看起来比实际情况更多，

[17] J. Hey. Global Minimum Taxation (GloBE): What Is It about and What Could Be a European Answer?[M]//G. Kofler, R. Mason & A. Rust, eds.. Thinker, Teacher, Traveler: Reimagining International Tax. IBFD,2021:250-251; L. A. Sheppard. EU Year in Review 2021: Creeping OECD Convergence[J]. Tax Notes International, Jan.3, 2022, at 11.
[18] Hey，同上，251。
[19] Hey，同上。
[20] Hey，同上。CCCTB 在过去十年左右的时间内一直都在讨论之中。
[21] Shay，前注 2。
[22] S.S. Johnston. U.S. Pillar 1 Tax Pitch Is Largely Revenue Neutral, Yellen Says[J]. Tax Notes, Jun.9, 2021.

并让这一方案更难延伸到更广泛的公司群体”。[23]“暂且不论分配方式如何，支柱一追求的目标之小着实让人惊讶！”[24] 尼日利亚拒绝接受该项共识，理由是支柱一并不能使其境况优于单边数字服务税。许多国家正在实施或拟议实施数字服务税，这一事实表明，市场国希望对数字业务征税。那种宣称“整个经济都已数字化，不可能出于税收目的将数字经济与其他经济隔离开来”的说法并不十分令人信服。后来正式的双支柱共识将自动化数字服务和面向消费者业务剥离出来，不作为支柱一的目标企业，实际上剥夺了市场国征收数字服务税的权力，却没有赋予这些国家同等的税基。因此，“双支柱共识完全无视后 BEPS 时代相关工作对数字经济的集中关注”。[25]

双支柱共识给人的印象是，这两大支柱构成了应对经济数字化税收挑战的一揽子方案。毕竟，这是 BEPS 第 1 项行动计划的产物，旨在应对数字经济带来的税收挑战。这两大支柱显然也是作为美国和其他国家之间“妥协”和“权衡”的一部分进行谈判的。然而，在实施方法和获得通过并成为法律的机会方面，支柱一是孤立无援的。支柱二得到采纳的迹象已然显而易见，美国已经制定了 GILTI，欧盟也已发布了指令提案，拟议将支柱二纳入欧盟法律，其他一些管辖区可能会确保其公司所得税有效税率至少为 15%。 而且，OECD 支柱 2 立法模板对 UTPR 的改动可以被视为对 先行者（firstmover）的鼓励。与此同时，没有明确迹象表明美国能够采用支柱一，而且，先行者会遭到美国的威胁。有些 OECD 成员国对支柱一前景也持怀疑态度。比如加拿大已决定在支柱一失效的情况下实行单边数字服务税；根据与美国达成的折衷安排，有几个国家(如英国，法国，意大利，西班牙，奥地利，印度，土耳其) 在支柱一成为法律之前，继续征收数字服务税。对数字企业征税以获得税收收入的需求，以及对支柱一的实施缺乏信心，有可能是形成前述动向的主要原因。

支柱一的技术设计涉及许多难以解决的根本性法律问题，本文第四部分将对此进行更详细的讨论。因此，支柱一目前的状态似乎相当难以预测。[26]

（五）两大支柱都并未真正关乎数字经济

如前所述，支柱二其实与经济数字化无关，支柱一对解决国际税收体系面临的根本挑战几乎没有作用。常设机构定义中传统的实际存在标准并不适用于远程企业或任何可以雇佣本地代理作为“傀儡”并在市场国不留下任何营业利润的企业，如娱乐、旅游、保险和再保险、货运和物流、飞机和船舶运输、电信和国际资本市场之类的传统服务企业。新的数字商业模式将这一列表扩展到出租车、IT 和几乎所有类型的服务（BEPS 第 1 项行动计

[23] Shay，前注 2，7。
[24] 同上。
[25] Brauner，前注 2，3。
[26] Li，前注 2。

划）。支柱一没有触及常设机构的问题，而是提出了一种基于销售的联结度，仅适用于少数大型跨国企业。因此，支柱一可以被视为针对一个重大问题的“创可贴”式的解决方案。

另一项根本挑战是转让定价。根据 OECD 转让定价指南运用独立交易原则非常复杂。尤其是在某些涉及无形资产或集团协同效益的情况下，独立交易原则的运用依赖于使用若干近乎虚构的假设。支柱一下金额 A 的公式分配法（Formulary Apportionment Method）是朝着解决这一问题的正确方向迈出的一大步，但这种方法的使用是对现有转让定价规则的补充，而不是替代。

此外，支柱一范围内规模最大的 100 家跨国企业中的大多数（即便不是全部）在主要市场国都有实体存在，因此金额 B 很重要。但是，双支柱共识中只有一小段关于金额 B 的内容：独立交易原则在国内基准营销和分销活动中的运用将得到简化和优化，尤其对于税收征管能力较低的国家而言更是如此。这项工作将于 2022 年年底前完成。[27] 这段文字讲的是“简化”和“优化”，而不是解决核心问题。并无一字涉及分配无形资产或剩余利润或者集团协同利润，而这些利润很可能是由跨国企业集团所有成员获得的。

在更基本的层面上，全球经济的数字化加剧了国家之间的不平等或所谓的南北问题。[28]双支柱共识中没有任何内容触及这一“数字鸿沟”以及贫富差距加大的问题。相反，有理由认为，这两大支柱都进一步巩固甚至增加了发达国家的利益，甚至包括约束发展中国家的财税政策自主权。[29]

（六）税收理念创新不多、税收主权限制不少

双支柱共识的“创新性”体现在其达成的方式上，这是一个由 OECD 牵头、并得到 G20 支持的，政治层面的多边进程，也是一种自上而下的方法。在此之前，对于国际税收规则的修改多是自下而上进行的，专家内行领导，通常源起于美国或其他 OECD 成员国，其他国家则出于自身的最佳利益陆续效仿。[30]国际联盟（联合国的前身）制定了双边税收协定范本，而不是强制性的多边公约或国内税收规则范本。OECD 和联合国继续依赖双边税收协定范本来影响国际税收的发展。OECD 还以协定范本注释、独立交易原则适用指南等形式，发布了“软法”。G20/OECD 主导的税基侵蚀和利润转移项目（2013—2015 年）制定了具体规则（主要是反避税规则）供各国采用，建立了同行审议程序来监控实施情况，并拟定了国际公法工具（即《实施税收协定相关措施以防止税基侵蚀和利润转移的多边公约》，以下简称“MLI”），以快速修订双边税收协定。因此，BEPS 项目是世界上第一

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[27] OECD.Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy [EB/OL].(2021-10-08)[2022-02-13].https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm.

[28] S. Dean & A. Waris. Ten Truths about Tax Havens: Inclusion and the “Liberia’ Problem[J]. Emory Law Journal,2021,70(7), Brooklyn Law School, Legal Studies Paper No. 670, available at SSRN: https://ssrn.com/abstract=3822421(UN study).

[29] Brauner，前注 2。

[30] Avi-Yona，前注 7；Li，前注 2。

个此种类型的多边进程。双支柱共识将这一多边进程扩展到制定若干新的、通用型实质性税收规则，以供各国遵循，并订立一项多边税收公约，以重新分配征税权。

然而，就国际税收理念而言，双支柱共识并无新意。支柱一系基于以销售额为依据的公式分配理念，该理念自 20 世纪 30 年代以来即已在美国付诸实施。[31]“剩余利润”的概念则自 20 世纪 90 年代中期以来就一直被用于转让定价。支柱二系基于美国在 20 世纪 60 年代颁布的受控外国公司（CFC）规则和 OECD 在 20 世纪 90 年代后期开展的“有害税收竞争”项目的相关理念，后者还反映在 BEPS 第 5 项行动计划之中。

可以说，支柱二削弱了价值创造原则，该原则是 BEPS 项目或 BEPS 1.0（2013—2015 年）的基石。支柱二将征税权赋予跨国企业集团最终母公司总部所在的国家，无论该国在价值创造和产生利润方面有何贡献。换句话说，支柱二的 IIR 规则认定总部所在国家有权对在另一个国家取得的利润征税；支柱二的 UTPR 规则不要求征收补足税的国家与利润的产生有任何关联。[32]

另一方面，关于限制税收主权，双支柱共识却有开疆拓土之举。具体体现如下：一是要求各国采用“通用型规则”，却无视各国在法律、文化或经济、财政利益中的差异；二是暂停实施数字服务税；三是将“征税权”视为可以在各个国家之间进行谈判的对象。支柱二的情况尤其如此。支柱二允许一个国家在其他国家没有充分行使其主要征税权的情况下，对利润“追加征税”（tax back）。国际联盟时代的国际税收制度并未考虑过此类追加征税；而根据 CFC 规则，此类追加征税仅限于消极所得或流动收入。支柱二现在将其扩展到与价值创造管辖区有更密切联系的积极营业所得，将价值创造管辖区的税收自主权权进行约束，如果它的 ETR 低于 15%，跨国公司的母公司所在国或任何子公司所在国都有权对积极营业所得征收补足税。事实上，支柱二限制了发展中国家利用税收优惠措施吸引外国投资的空间。

（七）现行国际税收制度“漏洞百出”，却仍然丝毫未受影响

双支柱共识将两大支柱叠加到现行公司所得税体系上，从而使现有“漏洞百出”的国际税收体系在很大程度上没有出现任何改观。例如，将常设机构联结度适用于远程企业仍然存在不足。虽然支柱一的金额 B 部分可能会为一些发展中国家降低复杂性，支柱二可能会降低范围内跨国企业使用转让定价策略将收入转移到海外的动机，但两大支柱均未明确触及将转让定价方法运用于全球化企业时存在的难题，尤其是无形资产收入或协同收益方面。在支柱一和支柱二的范围之外，这些困难仍然存在。

[31] Avi-Yonah，前注 7。
[32] Nikolakakis，前注 12。

如果这两大支柱土崩瓦解，国际税收制度倒是可能有机会涅槃重生。[33]说到底，这可能是双支柱共识真正有意义的影响。许多国家似乎很有可能会从基于实际存在的联结度这一传统观念转变为基于销售的税收征收。受 BEPS 项目中采用的价值创造原则等规范性理念以及某些管辖区数字服务税征收经验的启发，许多国家可能会意识到，它们实际上可以轻而易举地实现对远程卖家征税。

四、法律现实

（一）没有法律就没有税收

毋庸置疑，税收是一个法律问题。税收只能通过国内法征收。不同国家之间互有抵触的国内法，需要通过双边或多边协议进行“协调”。根据法治原则，只有立法机构才能通过立法对公司施加所得税义务。即使在普通法国家，税法也是依照法令颁行的，法官也不能通过判例创设纳税义务。立法机构通常使用税典形式立法来实现各种关键政策目标，包括筹集财政收入、通过激励公司活动和投资来促进经济增长，支持累进个人所得税以改善收入再分配状况。

（二）包容性框架或 OECD 不具有征税权

包容性框架不是一个拥有任何征税权或约束其成员税收立法权的超国家组织。事实上，没有一个国际组织拥有这样的征税权。历史上的国际联盟和目前的联合国都没有成员国赋予其征税权。这就是为什么它们在国际税收中的作用仅限于制定税收协定范本，供各国参考。2021 年，七十七国集团（G77）和中国主张将联合国税收事务国际合作专家委员会（UN Committee of Experts on International Tax Cooperation in Tax Matters）升级为联合国经济及社会理事会（ECOSOC）下属的政府间机构。[34]由于受到美国和其他 OECD 成员国的反对，这样的提议不太可能付诸实施。

OECD 通过制定国际“标准”或指南、更新 OECD 范本、为包容性框架提供技术性专业知识，以及协调美国和其他 OECD 成员国（尤其是欧盟成员国）的利益，在维持当前国际税收秩序方面发挥了重要作用。然而，OECD 无权建立税法规则来约束其成员国，更不用说非成员国了。

世界贸易组织（WTO）的规则限制了各国政策制定者制定可能阻碍自由贸易的税收政策的自由。WTO 的争议解决机构已就影响贸易的税收争议作出裁决。但是，无论是在国内还是国际上，WTO 都没有参与税法改革。

[33] Cooper，前注 2。
[34] http://www.g77.org/statement/getstatement.php?id=170407b.

到目前为止，尚无任何国际税收组织存在，其中的主要原因之一是，各国都希望保持其财政自主权和独立性。[35]税收是一个国家的生命线。没有财政能力，一国很难提供其公民所要求的公共产品和服务。由于各国的政治与社会环境不同，公民与政府的锲约关系也不尽相同，导致各国财政利益（包括支出选择以及与其相应的税收制度）的多样性。因此，各国很难就税收政策或税法设计达成任何国际共识。这就是国际联盟在 20 世纪 30 年代没有制定多边税收协定范本的原因。尽管出现了经济全球化，但政治与社会层面并没有全球化，决定财政和税收政策的制度仍然是以各国为基础。

（三）没有国内法，全球性共识就无法发挥作用

国内法是唯一可以对跨国企业开征税收的法律。国际税收规则可见于国内税法和双边税收协定之中。因为税收协定仅仅减少根据国内法确定的纳税人的税款，所以它不会创设任何应税义务，而且从其本质上来说只是“宽免”。事实上，正如 BEPS 第 6 项行动计划成果报告所示，纳税人经常利用税收协定在两个协定伙伴国家避税。因此，“真正的”国际税收规则只能体现在国内法之中，支柱一或支柱二的实施也必须通过修改国内法。

双支柱共识似乎赋予了 OECD 前所未有的权力，为双支柱起草立法模板，并提供注释。尚不清楚这些立法模板将如何转化为国内法，以及 OECD 立法模板和注释的法律地位。就支柱二立法模板而言，OECD 已经提出了双支柱共识中没有的内容，如低税利润（而不是“款项支付”）税收和合格国内最低补足税。为了使这项共识在实践中真正发挥作用，OECD 不可避免地需要制定能够在法律上生效的技术规则。实际上 OECD 正在为各国制定税法，然而很少有国家愿意将这一权力让渡给它，因为 OECD 的官员不是由任何国家（即使是 OECD 成员国）的任何人选举产生的。

OECD 的立法模板能被 100 多个国家引入其国内法吗？换言之，模板能抹平各国之间公司所得税法的不同吗？如果不能抹平这些税法各异产生的根源（如各国利用公司税取得税收的程度以及利用税收优惠措施鼓励某些公司投资和活动，如研究与开发、区域发展、对诸如石油和天然气之类行业的投资，或对环境技术的投资），自上而下推行的表层的抹平税法条文能扎根生效吗？

除了各国财政政策需要导致公司所得税法的各异，各国的法律制度与文化的不同也导致公司税法的不同。因为税法依靠一般性的法律来运作，不同的法律制度导致不同的公司法，财产法 安定这些发影响公司所得税的规则。例如，某个企业实体是否属于公司性质，取决于公司法；公司交易的有效性取决于合同法、知识产权法和其他法律。各国法律不尽相同，导致对实体和交易出现不同的定性，或者出现混合实体或工具的问题。一般性法律中存在的这种差异性，往往是税收筹划的基础，或是“无国籍收入”问题的根源。例如，这种差异可能带来转让定价问题和独立交易原则适用困境。跨国企业可以在避税地设立特

[35] M. Herzfeld. Are Pillars 1 and 2 Compatible with Sovereignty and Democracy?[J].Tax Notes Federal, Dec.7, 2020, 1557.

殊目的实体，进行融资或持有高价值的无形资产，以减少高税收管辖区的应税利润。公司所得税各种问题的一个根源是法律虚拟——每个公司都被视为独立的法人。支柱一和支柱二采用集团合并方法来解决这一问题。然而，在现有法律中调和集团法与独立实体法并不容易。支柱二可能会降低此类问题的严重程度，但无法从根本上解决问题。如果支柱二只是治标不治本，它的意义到底有多大?

（四）支柱二的实施需要多边税收协定

双支柱共识声明强调支柱二（GLOBE 部分）的实施不需要多边税收协定或国际公法工具，只要有国内法就可以了。这个观点在法律上是有欠缺的。

首先，UTPR 可以说是与双边税收协定相冲突的。从表面分析，IIR 是公司集团母公司的所在国按照居民地原则对缴纳低于 15%ETR 的实体成员的利润正补足税，类似与现行的 CFC（境外受控公司）规则，与美国的 GILTI 性质一样，一般认为与双边税收协定不矛盾。[36] 但是，UTPR 就不同了。原因有三:

(1) 双边税收协定是签约方就公司所得税的协调做出的立法承诺，以达到避免双重课税和相互尊重税收主权的目的。言下之意是签约方对公司利润的课税按照协定规定进行，不在协定之外对公司所得征税。如果甲国与乙国有双边税收协定，甲国的成员实体的利润为 100, ETR 为 8% （因为享受税收优惠），乙国的成员实体与甲国的成员实体为姐妹关系，但没有任何业务往来。乙国按照 UTPR 对乙国的成员实体征收补足税（7%, 或 7） -- 即甲国税收优惠放弃征收的税款。乙国跟在甲国产生的 100 利用没有任何关联，按照国际惯例和理论，乙国不享有任何征税权。根据 UTPR 征税补足税违背双边税收协定的精神和目的。
(2) 双边税收协定的第 7 条只允许公司的居民国和利润的来源国征税。在以上的案例中，乙国就甲国成员实体的 100 利润征 7%的所得税没有协定的允许。
(3) 双边税收协定的第 24 条禁止税收歧视。如果把以上案例加上一个母公司所在国，X 国，乙国对乙国的成员实体的征的 UTPR 补足税，因为该补足税不对乙国本国跨国公司的子公司成员实体征收，而只针对外国（如 X 国）的跨国公司的子公司征收，它违反 X 国与乙国的双边税收协定的第 24 条的规定。

所以，我们可以猜测，乙国的成员实体会对乙国的税务局要求它缴纳的补足税在法院提出质疑，请求法官考虑乙国的 UTPR 是否违背乙国的税收协定项下的国际法律义务，因此无效。税收法定原则是一个基本原则；国内法不能违背国际法也是一个基本原则。 法官有可能判纳税人胜诉。任何有双边税收协定的国家的成员实体都可能采取类似的司法措施，导致 UTPR 的实施的法律不确定性。

次之，多数 OECD 成员国都是维也纳条约公约的签署国。该公约要求各国依照“诚信”（Good faith） 原则执行国际协定，包括税收协定。如果上面的案例分析能够说服法

[36] 也有专家认为 IIR 也与税收协定有矛盾，如：V.Chand, A. Turina and K. Romanovsak. Tax Treat Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges [J]. World Tax J. , 2022, 14(1).

官 UTPR 可能违背双边税收协定，乙国的 UTPR 规则很有可能被法官认定为与维也纳公约的“诚信”原则相互冲突。

另外，即使 UTPR 没有违背双边税收协定和维也纳公约，实施 UTPR 与 IIR 规则在没有多边协定协调的情况下会产生双边或多边税收纠纷。不管是 UTPR 还是 IIR，补足说的计算是国别式的。虽然公司集团总利润是按照会计规则计算，但税务调整与各国的国内税法有关。 ETR 的国别计算，UTPR 的国别计算以及公式分配， 如果么多边协定的协调，很难想象各国的计算不发生冲突，不导致双重或多重课税与纠纷。 实施支柱一需要多边税收协定的理由同样使用于支柱二。

（五）阻碍采用多边税收协定的原因依存

支柱一和支柱二的实施需要制定新的多边税收公约。然而，历史表明，类似的多边公约也曾在尝试后，宣告失败，因为各国不会将其税收主权让渡给一个不能代表其利益的多边公约，而且很难制定最大程度上兼顾不同国家财政利益的多边公约。

经济数字化是否带来了各国财政利益和各国税法的“标准化”？答案必须是“否”。首先，美国对支柱一的兴趣不同于其他国家，因为美国是范围内跨国企业的母国管辖区，当大多数其他国家主要是市场管辖区，可能会获得一些新的税收收入时，美国一定会“损失”税收收入。美国 BIDEN 当局支持支柱一可能是“不得已”, 为“讨价还价”取得共识。其他国家，如加拿大，是市场国，为了防范出现税收收入损失，会坚守其对远程销售利润的征税。加拿大拟定了自己的数字服务税法，如果支柱一的多边公约得到实施，则遵从该公约，否则将开征数字服务税。[37] 虽然支柱一的性质为公司所得税，数字服务税法则为特别销售税，不受双边税收协定的制约。

其次，发展中国家或者说资本输入国与资本输出国的利益不同。即使在发展中国家之间，公司所得税政策也存在分歧。有些国家选择不征收公司所得税，有些选择实行较高的名义税率但提供有针对性的税收优惠措施。 在很多发展中国家，公司税占税收总收入的比重高于发达国家，而且不与个人所得税“一体化”。

据说包容性框架的部分成员并非十分理解和真心的赞同双支柱的内容，而是受到某些压力或“推动”（arm twisting）[38] 才加入双支柱共识的。当签署多边公约时日来临之际，如果看不到实际好处，这些成员可能会决定“退席”。当支柱一或支柱二转化为税收收入的具体数额或对就业和经济增长产生影响不明时，一些国家可能会意识到，不受多边公约的掣肘对其更为有利。

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[37] Wilkie，前注 2。

[38] N.A. Sarfo & S.S. Johnston. A Brave Bet: The Inclusive Framework’s High-Stake Future[J]. Tax Notes International, Dec.20, 2021, 1326.

实施两大支柱的紧迫时间表可能会“吓跑”一些国家。这正是 BEPS 相关协议所发生的情况，一些国家匆忙加入其中，最终在大多数情况下被冷落一旁。[39]此外，“对各国施加限制，使其不能以符合自身最佳利益的方式行事的规则可能会同时殃及富裕国家和贫困国家；而在一个要求美国交出部分税基却得不到任何回报的制度下，美国注定要输。”[40]

在有些国家，通过多边公约更改国内税法需要修订宪法。修宪法是件非凡的法律程序。如果公民和立法机关看不到修宪的实际需要，修宪成功的可能性不会太大。这些国家的政治家和政府官员们会签订多边协定，但该协定不会在法律上有效，最终只是“纸上谈兵”而已。

此外，在很大程度上，美国国会可能是共识能否实施的关键。目前没有太乐观的迹象表明国会会通过国内立法，将 GILTI 与支柱二一致，签署和批准此类多边公约。美国一直在国际税收领域是“另类”，[41]有其独特的利益，享受税收政策引领的地位。这个惯性是否为双支柱共识所改变是个很大未知数。

（六）运行两套平行的税收制度颇具挑战性

假设一个国家将支柱一和/或支柱二纳入其国内法之中，它将拥有两个平行的公司所得税制度：一个基于合并财务会计报表的全球制度，另一个则基于针对每个实体确定的应税收入的现行制度。

对于所有国家来说，支柱一意味着将建立一个全新的税收体系，该体系依赖于新的联结度测试和针对范围内纳税人的全球公式化分配方法。如果范围内的跨国企业在市场管辖区内具有实际存在，则需要协调现有规则和支柱一规则，以防止双重征税。

此外，每一个同时采用支柱一和支柱二的国家都需要弄清楚这两种税收制度是如何相互影响的。例如，支柱一税收是计算支柱二下有效税率的“范围内税收”（covered tax）吗？支柱一税收是否可以抵减支柱二的补足税？在实施消除双重征税措施之前或之后，是否会向每个管辖区分配支柱一税收？

国际税法规则演变的挑战往往不是没有高层的好主义或好模板，而是缺乏行之有效的地面层次的操作 (the “devil is in the detail”) 。 共识声明和 OECD 的模板对“细节魔鬼”认知和应对可能是不足的。

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[39] Brauner，前注 2，4。

[40] M. Herzfeld. Are Pillars 1 and 2 Compatible with Sovereignty and Democracy?[J].Tax Notes Federal, Dec.7, 2020, at 1562.

[41] 参见 J. Li. China’s Rising (and the United States’ Declining) Influence in Global Tax Governance? Some Observations [J]. Bulletin for International Taxation, 2021,75(11/12)；R.S. Avi-Yonah. Constructive Unilateralism: U.S. Leadership and International Taxation, 42 Int’l Tax J. 17 (2016).

（七）复杂性

关于这两大支柱和美国的 GILTI，已有大量的评论，普遍的反应是过于复杂。OECD 支柱二的立法模板篇幅长达 70 多页，相关指引可能会更为冗长；支柱二的 STTR 还尚未触及，情况就已然如此。

从发展中国家的角度来看，技术方面的复杂程度令人望而生畏，应接不暇，且各项规则难以理解。从发达国家的角度来看，其现行税收规则已经非常复杂（如加拿大的所得税法超过 100 万字，印刷版的重量超过 1 公斤），叠床架屋般地增加支柱一和支柱二，将使税收制度越发复杂。

因两大支柱本身都较为复杂，且相互之间存在矛盾之处，在此双重重压之下，双支柱可能不堪负累而崩溃。美国的 GILTI 和税基侵蚀与反滥用税（BEAT）是由美国财政部/国内收入局（IRS）的税务专家为美国纳税人编写的，纳税人再向其税务顾问支付重金，帮助其理解并遵从相关法律规定。OECD 的立法模板草案同样复杂，很难看出这一模板如何在许多国家得以复制。OECD 的全球最低税规则范本即使不说更复杂，至少是同样复杂。对于更为大而化之的税收制度来说，怎么样才能行得通呢？[42]

在诸如新西兰之类较小的国家，一个合理的问题是，如果通过两大支柱获得更多税收收入的前景不明朗或微不足道，那么，是否值得费心去实施？希望成为一个好的全球公民足以弥补实施所带来的立法，执法和司法方面的复杂与遵从成本吗？[43]

（八）不确定性

尽管OECD竭尽努力确保“税收确定性”，但这两大支柱仍具有“异乎寻常的不确定性”。[44]这种不确定性存在于规则设计、缔结多边公约、将全球规则转变为国内法、争议解决、遵从和管理等层面。

关于规则设计，OECD 支柱二立法规则范本被预设为国内立法的模板，但由于近 140 个管辖区的国内立法各有不同，故而不可能做到精确和简洁。因此，在为各国法律创建全球模板的过程中必然存在不确定性。使用财务会计定义来确定应税义务和全新的概念（如支柱一中的新联结度以及对合并集团成员按管辖区确定有效税率）等，都会产生不确定因素。

关于支柱一的多边公约及其与现有双边税收协定的相互作用可能也是不确定的，尤其是在金额 B 及争议预防和解决机制方面。更重要的是，时机把握和最终结果目前尚不确定。

[42] Burnett，前注 10，138。

[43] D. Elwela. BEPS 2.0 – The Final Frontier?[EB/OL].[2022-02-13].https://home.kpmg/nz/en/home/insights/2021/10/beps-2-0-the-final-frontier.html.

[44] W. Schön. Is There Finally an International Tax System?[M]//G. Kofler, R. Mason & A. Rust, eds.. Thinker, Teacher, Traveler: Reimagining International Tax. IBFD,2021:488.

不妨回顾一下，MLI 出台的时间是在 BEPS 最终报告发布一年多以后才开放供签署，起草的时间远远超过一年，而且 MLI 比支柱一的多边协定（MLC）简单得多，因为它不涉及税权的重新分配，只是将经过事先商定的修改现行双边协定的内容用国际公法工具表述出来。 支柱一多边协议必须解决各方所关注的实质性的问题，并在很大程度上从无到有地拟定实质性的表述, 协调各方面的关系。OECD 金额 A 的立法模板草稿刚刚出台，相关方可能还需要更多的时间，来深思熟虑这一创新性协议预想中盘根错节的各项细节，离达成一致意见还要不少时间，而且最终能否达成一致意见也不清楚，因此 MLC 所需的时间可能是 MLI 出台时间的倍数。[45]

此外，在没有多边公约来执行支柱二的情况下，UTPR 的合法性有待商榷，如何计算国别 ETR，补足税以及解决纠纷都有跟多不明之处。 由于 QDMTT 引入，一些国家在确保对范围内大型跨国企业实行 15%ETR 的同时，可能会在支柱二之外继续进行逐底税收竞争（如对于较小的跨国企业和国内企业的公司税的优惠以及对范围内大型跨国企业的非所得税方面的优惠）。这样做是否能够得到允许？如果各国对于其合格国内最低补足税的设计，是在表面上遵守共同方法，但通过非所得税措施补贴跨国企业，那么该如何处理？如果各国对立法模板的翻译各不相同，应该如何处理这种差异？如果这种分歧导致税收争议，那么，争议解决机制是什么？这些目前还都没有答案。

支柱一中的税收确定性机制充满了对参与管辖区税收管理部门和纳税人行为的模棱两可和不切实际的假设。[46]该机制的特殊性质也使其非常不确定。很难看出，在税收仲裁方面缺乏经验或信心的发展中国家会如何信任税收确定性程序。

五、结论

不管是谁，只要对国际税收感兴趣，眼下这段时间着实令人兴奋，因为我们正亲眼目睹一个多边、开放的进程，这一进程试图改变一个持续了上百年的制度。到目前为止，结果还说不上明朗或确切，因为在过去的 100 年中，使现有体系得以成形的基本元素没有多少变化：每个国家都拥有征税权，以其各自的方式承担财政重任并对其公民负责。征税权直接转化为各国的税收收入，用于支付医院、社会福利和国防等方面的公共支出。由于支柱一和支柱二是在各个税收管辖区之间分配征税权，这种分配从其定义来看，是一种零和博弈，因此将在各国之中产生赢家和输家。要想达成一项可在法律上予以执行的真正的全球协议，需要各参与国都感到有所收获。而要想方设法让 140 个管辖区中的每一个都觉得自己是“赢家”，可能近乎水中逐月。

[45] M. C. Bennett. Contemplating a Multilateral Convention to Implement OECD Pillars 1 and 2[J]. Tax Notes International, June 11, 2021.

[46] Sheppard，前注 2。

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