THE YALE LAW JOURNAL FORUM

OCTOBER 25, 2018

International Cooperation and the 2017 Tax Act

Susan C. Morse

ABSTRACT. There is a silver lining for the corporate income tax in the Tax Cuts and Jobs Act of 2017. This is because the Act's international provisions contain not only competitive but also cooperative elements. The Act adopts a lower, dual-rate structure that pursues a competitiveness strategy and taxes regular corporate income at 21% and foreign-derived intangible income at 13.125%. But the Act also supports the continued existence of the corporate income tax globally, thus favoring cooperation among members of the Organisation for Economic Cooperation and Development (OECD). Its cooperative provisions feature the minimum tax on global intangible low-taxed income, or GILTI, earned by non-U.S. subsidiaries. Another cooperative provision is the base erosion and anti-abuse tax, or BEAT. The impact of the Act on global corporate income tax policy will depend on how the U.S. implements the law and on how other nations respond to it.

INTRODUCTION

In 2017, House Speaker Paul Ryan, Representative Kevin Brady, and Senator Mitch McConnell accomplished something that many others, including former President Barack Obama, had long aimed to achieve. They lowered the federal corporate tax rate so that the U.S. rate now falls within the same range of rates used in most of the rest of the world. The Tax Cuts and Jobs Act of 2017 (TCJA) has attracted just criticism for its deficit financing, for its abysmal legislative craftsmanship, and for its sometimes-misguided policy objectives.[1] But Congress deserves credit for the TCJA's international corporate tax provisions that

1. *See, e.g.*, Michael Graetz, *Foreword—The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy*, 128 YALE L.J.F. 315, 318-19 (2018) (comparing TCJA's process of less than three months to the longer and more considered process leading up to the 1986 Act); David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. (forthcoming 2018).

move the United States closer to the framework used by other countries. The TCJA may help establish a minimum tax rate globally, thus arguably saving the corporate income tax.

The characters in this story are multinational corporations (MNCs) and the states that seek to tax them. We may think of a certain multinational corporation as a "U.S." firm—for instance, because its publicly traded parent company is incorporated in the State of Delaware. Yet, by definition, a multinational firm does business in two or more national jurisdictions. When setting corporate tax policy, legislation may pursue a strategy of "cooperation," to help nations maintain a positive corporate tax rate, or it may pursue a "competition" strategy, by lowering tax burdens in hopes of attracting investment. The TCJA features both.

Part I of this Essay compares U.S. law before the TCJA, which I call the "maybe later" approach, to the provisions of the TCJA. The TCJA includes both provisions that reduce the U.S. corporate tax burden, like the dual, lower rate structure for U.S. income; and provisions that tend to increase corporate taxes, like the minimum tax on global intangible low-taxed income (GILTI) and the base erosion and anti-abuse tax (BEAT). Part II investigates the tax policy of "competitiveness," which presupposes that reducing tax burdens will increase corporate profitability and thus attract investment to a state. The rate reduction component of the TCJA uses deficit financing to decrease the corporate tax burden significantly, but it does not set the United States on a path toward eliminating the corporate income tax.

As Part III explains, the TCJA also includes cooperative elements. Part III proposes that the TCJA advances a strategy of "cooperation" by using the U.S. tax system to support the corporate income tax laws of other members of the Organisation for Economic Cooperation and Development (OECD), while excluding or punishing tax haven countries. Part III highlights the GILTI minimum tax and the BEAT as de facto cooperative provisions that support the corporate income tax. Whether the GILTI minimum tax and the BEAT help preserve the corporate tax as a lasting feature of global tax policy will depend on how the United States implements the details of the law and on how other nations respond to it.

I. BEFORE AND AFTER THE TCJA

A. Before the TCJA: The "Maybe Later" Framework

Before Congress enacted the TCJA, the U.S. international corporate tax message came down to this: the United States reserves the right to tax U.S.-parented multinationals on all the income they earn anywhere, at the highest income tax rate in the world—but it probably will not exercise this right. This framework dated back to the 1960s, when there was great confidence in the global demand for U.S. capital.[2] Its components included "worldwide" taxation, current "Subpart F" taxation of passive and mobile income earned by non-U.S. subsidiaries of U.S. multinationals, a high statutory corporate tax rate based on a 35% national rate, and a foreign tax credit.

Taken together, these elements could eventually impose U.S. tax obligations on non-U.S. income earned through non-U.S. subsidiaries, except to the extent non-U.S. jurisdictions had collected income tax. But crucially, a U.S. multinational firm often could defer the payment of U.S. corporate income tax on non-U.S. profit indefinitely.[3] Deferral strategies included utilizing transfer pricing laws that allowed firms to transfer enormous value to tax havens tax-free[4] and exploiting loopholes that allowed controlled foreign corporations (CFCs), or non-U.S. subsidiaries of U.S. shareholders, to designate large amounts of tax-deferred non-Subpart F income.[5] Deferral lasted until the moment when a non-U.S. subsidiary distributed a dividend to its U.S. parent,[6] and the terms of future U.S. taxation of such a dividend were necessarily uncertain.[7]

---

2. A Kennedy administration proposal would have taxed currently (and at the same rates applicable to domestic income) all income earned by non-U.S. subsidiaries. *See* 107 CONG. REC. 6456, 6458 (1961). This exemplified the idea of capital export neutrality, under which a residence country (i.e., the United States) taxes the worldwide income of its residents (i.e., corporations with parents incorporated in the United States) to ensure neutrality in "the placement of productive resources" (i.e., in-demand U.S. capital). *Report of the Task Force on International Tax Reform*, 59 TAX LAW. 649, 681 (2006). The enacted Subpart F regime walked back from the Kennedy proposal and sought to tax currently only passive and mobile income, but for decades capital export neutrality persisted as the dominant Treasury Department theory. *See id.* at 686, 731.

3. *See* Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 719 (2011).

4. *See* Ilan Benshalom, *Sourcing the "Unsourceable": The Cost Sharing Regulations and the Sourcing of Affiliated Intangible-Related Transactions*, 26 VA. TAX REV. 631, 643-46 (2007) (explaining cost-sharing regulations as a global tax competition move).

5. *See* Lawrence Lokken, *Whatever Happened to Subpart F?: U.S. CFC Legislation After the Check-the-Box Regulations*, 7 FLA. TAX REV. 185, 197-202 (2005).

6. U.S. MNCs experienced deferral as an important benefit despite claims of the so-called "new view" theory, which established the arithmetic equivalence of immediately taxing profit or waiting for the distribution of a dividend. *See* George R. Zodrow, *On the "Traditional" and "New" Views of Dividend Taxation*, 44 NAT'L TAX J. 497 (1991). The new view rests on two questionable assumptions: first, that firms would have to repatriate eventually and second, that the rate of tax would not decrease. *See id.* at 498 (citing assumption of dividend payment); *id.* at 499 (providing example of "new view" model featuring constant tax rates).

7. Future rate uncertainty arose in part because of the fundamental inability to bind future legislatures and in part because of a 2004 repatriation tax holiday. *See, e.g.*, Thomas J. Brennan, *What Happens After a Holiday? Long-Term Effects of the Repatriation Provision of the AJCA*, 5 NW. J.L. & SOC. POL'Y 1 (2010) (analyzing the 2004 provision that reduced the effective tax rate on repatriated profit to 5.25%).

The pre-TCJA U.S. carveouts interacted with financial accounting rules[8] to force MNCs to face a future promise of a high rate of tax but the present reality of low tax liability. The carveouts greatly reduced the current cash burden of the U.S. income tax system for multinationals.[9] But the default accounting rules still treated the system as "worldwide."[10] That is, the rules required the accrual of tax expense on unrepatriated non-U.S. profit at the top statutory rate—35% federal, or about 39% with state income taxes factored in[11]—except for amounts designated as "indefinitely reinvested" earnings that the firm planned to keep offshore.[12] The "indefinitely reinvested" designation attached to a fraction—perhaps 60% or so—of non-U.S. profit retained by non-U.S. subsidiaries of U.S.-parented multinationals.[13] It reduced U.S. multinationals' tax accruals and lifted reported profits. But the indefinitely reinvested, or permanently reinvested earnings (PRE) designation raised a new problem known as lock-out.[14] Lock-out

---

8. Recent empirical work suggests that accounting accruals are often more important than cash tax expenses for decisionmakers at public corporations. *See, e.g.*, John R. Graham et al., *Tax Rates and Corporate Decision-making*, 30 REV. FIN. STUD. 3128, 3141 tbl.3 (2017) (finding, based on an interview study, that 44% of firms based decisions on the statutory tax rate and 41% did so on the average effective tax rate as measured by financial accounting). *See generally* Lily L. Batchelder, Accounting for Behavioral Considerations in Business Tax Reform: The Case of Expensing 17-19 (Jan. 24, 2017) (unpublished manuscript), https://ssrn.com/abstract=2904885 (summarizing empirical studies that conclude that firms accept worse cash tax results to achieve better financial accounting results).

9. Scott D. Dyreng & Bradley P. Lindsey, *Using Financial Accounting Data to Examine the Effect of Foreign Operations Located in Tax Havens and Other Countries on U.S. Multinational Firms' Tax Rates*, 47 J. ACCT. RES. 1283, 1286-87 (2009).

10. *See* Kevin Markle, *A Comparison of the Tax-Motivated Income Shifting of Multinationals in Territorial and Worldwide Countries*, 33 CONTEMP. ACCT. RES. 7, 10-11 (2016) (explaining that total tax payable, and thus accrued, under a "worldwide" system is based on U.S. and other country taxes imposed (less foreign tax credits), except that if "earnings are deemed to be indefinitely invested in the foreign country," then tax expense is recorded only when a dividend is distributed).

11. The calculation of 39% reflects a deduction for state taxes from the federal tax base as well as the additional state income tax rate. *See Statutory Corporate Income Tax Rate*, ORG. FOR ECON. COOPERATION & DEV. tbl. II.1 https://stats.oecd.org/index.aspx?DataSetCode=TABLE_II1 [https://perma.cc/5SSU-3XKM].

12. *See supra* note 10 (explaining the "indefinitely reinvested" designation).

13. Jennifer L. Blouin et al., The Location, Composition, and Investment Implications of Permanently Reinvested Earnings 46 (Jan. 2017) (unpublished manuscript), https://ssrn.com/abstract=2154662 (reporting aggregate PRE of $808 billion and aggregate foreign retained earnings of $1.377 trillion in 2009 for firms with non-zero PRE).

14. The financial accounting friction restrained firms' willingness to distribute intercompany dividends from foreign subsidiaries, even though "lock-out" did not prevent the deployment of overseas CFC profit in U.S. investments (for example, CFC profit could be held in U.S. banks). *See* Stephen E. Shay, *The Truthiness of 'Lockout'*, 146 TAX NOTES 1393, 1399 (2015) occurs when MNCs refuse to repatriate earnings because repatriation—for instance, through a dividend—would require the accrual of a fresh income tax expense at a high tax rate, such as 35%. This refusal meant that despite the option of PRE designation, the carveouts that reduced the U.S. cash tax rate did not translate smoothly to financial accounting.

B. After the TCJA: "Now or Never"

With the TCJA, the United States departed from the strategy it had pursued since the 1960s. Instead, the TCJA favors global norms both as to tax rate and tax rule structure.[15] The TCJA eliminated and reversed the gap between the average OECD statutory corporate tax rate (roughly 24%) and the U.S. federal statutory rate (35%).[16] Under the TCJA, there is a dual rate structure for U.S. income: the top rate of 21%,[17] and the effective rate of 13.125% (increasing to about 16.4% in 2026) for foreign-derived intangible income (FDII).[18] The TCJA's dual rate structure for corporations' U.S. income is achieved through a deduction equal to 37.5% of FDII[19] (reduced to 21.875% in 2026[20]). Roughly

(criticizing the idea that lockout deprives U.S. investments of capital and noting a separate financial accounting question).

15. *Cf.* Reuven S. Avi-Yonah & Gianluca Mazzoni, *BEPS, ATAP and the New Tax Dialogue: A Transatlantic Competition?* 2 (Univ. of Mich. Pub. Law Research, Working Paper No. 612, 2018), https://ssrn.com/abstract=3204242 (arguing that the TCJA furthers the goal of the "single tax principle" that all corporate income should be taxed once and supports the implementation of the OECD's base erosion and profit shifting (BEPS) project).

16. *See, e.g.*, Martin Sullivan, *The Truth About Corporate Tax Rates*, FORBES (Mar. 25, 2015, 8:50 AM), https://www.forbes.com/sites/taxanalysts/2015/03/25/the-truth-about-corporate-tax-rates [https://perma.cc/DUC7-X9L9] (citing an average statutory tax rate of 24.8% (28.3% when weighted by GDP) and comparing the statutory rate gap to a smaller effective tax rate gap).

17. I.R.C. § 11(b) (2018).

18. The FDII effective tax rate initially equals 13.125%, calculated as follows based on the applicable deduction of 37.5%, *see* I.R.C. § 250(a)(1)(A); and the top corporate rate of 21%, *see* I.R.C. § 11(b): Effective rate = 21% * (fraction of FDII included in income) = 21% * (1-.375) = 13.125%. For taxable years after 2025, the effective FDII tax rate equals 16.40625% based on the applicable deduction of 21.875% under I.R.C. § 250(a)(3)(A): Effective rate = 21% * (fraction of FDII included in income) = 21% * (1-.21875) = 16.40625%.

19. I.R.C. § 250(a)(1)(A).

20. *Id.* § 250(a)(3)(A).

speaking, FDII equals a taxpayer's income from exports[21] less an imputed 10% return on tangible assets deemed to support that income from exports.[22]

This dual rate structure bears some similarity to other countries' dual rate regimes, which are sometimes structured as innovation boxes. For instance, the FDII formulaic approach to identifying residual profit resembles the United Kingdom's patent box regime, which applies a special 10% rate to intellectual property profit after subtracting routine returns.[23] The United Kingdom has a dual rate structure of 19% (regular) and 10% (patent box). After the TCJA, the United States also has a dual rate structure of 21% (regular) and 13.125% (FDII). In both cases, the objective may be to keep more mobile, or tax-elastic, investment within the taxing jurisdiction.[24] However, because it blatantly connects exports and a lower tax rate, the FDII provisions appear to violate the World Trade Organization's (WTO) ban on export subsidies.[25]

The TCJA also defends against erosion of the U.S. tax base. It does so through the base erosion and anti-abuse tax, or BEAT. The BEAT is a minimum tax that penalizes excessive deductible payments, such as interest and royalties, made by certain U.S. firms to related non-U.S. firms.[26] The BEAT applies at a

---

21. That is, income derived from selling services or property to a foreign person for foreign use, less allocable deductions. *See id.* § 250(b)(4).

22. The statute allocates a proportion of U.S. tangible assets to FDII. The numerator is, roughly speaking, U.S. source income from exports and the denominator, is, roughly, U.S. source income. Oil and gas extraction income or financial services income are excluded from both the numerator and the denominator. The statute calls the numerator "foreign-derived deduction eligible income" and the denominator "deduction eligible income." *Id.* § 250(b). Daniel Shaviro calls the numerator "income that actually was from exports" and the denominator "U.S. source income that might have been from exports." Daniel N. Shaviro, *The New Non-Territorial U.S. International Tax System, Part 2*, 160 TAX NOTES 171, 186 (2018). The 10% return is calculated on the adjusted basis of the relevant assets. *See* I.R.C. § 250(b)(2)(B) (cross referencing § 951A(d) definition of qualified business asset investment); I.R.C. § 951A(d) (using "aggregate adjusted bases" of property).

23. *See* Peter R. Merrill et al., *Is It Time for the United States to Consider the Patent Box?*, 66 TAX NOTES INT'L 67, 72 (2012) (explaining calculation of relevant intellectual property income, or RIPI, less routine return and marketing return).

24. *See* Peter Merrill, *Innovation Boxes: BEPS and Beyond*, 69 NAT'L TAX J. 847, 847 (2016) (reporting that fourteen out of thirty-five OECD countries implemented patent boxes between 2000 and 2016). The idea that more elastic income should be taxed more lightly is often called "Ramsey taxation." *See* F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 58-59 (1927).

25. *See* Avi-Yonah & Mazzoni, *supra* note 15, at 8-9 (arguing that the WTO problem is "blatant and obvious"). *But see* Chris William Sanchirico, *The New U.S. Tax Preference for "Foreign-Derived Intangible Income"*, 71 TAX L. REV. (forthcoming 2018) (arguing that the FDII provisions do not clearly violate WTO rules).

26. Taxpayers subject to the BEAT do not include firms with less than $500 million in average annual gross receipts. I.R.C. § 59A(e)(1)(B); *see also* Bret Wells, *Get with the BEAT*, 158 TAX rate of 10% for tax years between 2019 and 2025[27] to an alternative base calculated by adding back most categories of related-party deductible payments. At a 10% BEAT rate, and assuming that a 21% regular tax rate applies, the BEAT allows a U.S. firm to use related-party payments to reduce taxable profit by more than half before facing any BEAT liability.[28] Foreign tax credits do not reduce BEAT liability.

For the non-U.S. income of non-U.S. subsidiaries of U.S. multinationals, the TCJA adopts a "now or never" approach.[29] Like other nations, after the TCJA, the United States either taxes the foreign income of foreign subsidiaries currently, or does not tax them at all. The TCJA did not embrace "territoriality," which would imply abandoning the taxation of CFCs, even though it provides a deduction for dividends from CFCs.[30] Subpart F survives. Also, the TCJA adds a minimum tax on "global low-taxed intangible income," or GILTI, earned by CFCs. The minimum tax is implemented by first including GILTI in taxable U.S. income,[31] then allowing a deduction for a portion of GILTI.[32]

GILTI is defined as gross income minus amounts including Subpart F income, "high-taxed" income subject to a foreign tax rate greater than 18.9% or more, a 10% imputed return on the adjusted basis of the CFC's tangible assets, and "deductions (including taxes) properly allocable to such gross income under rules similar to the rules of section 954(b)(5)."[33] From 2018 through 2025, 50% of the GILTI tax base is deductible. Starting in 2026, 37.5% of the GILTI tax base is deductible.[34] Eighty percent of foreign income taxes allocable to GILTI are creditable.[35]

NOTES 1023, 1030-31 (2018) (criticizing this exception and noting that other Treasury guidance has identified earnings stripping as a problem for firms with $50 million in annual revenue).

27. The BEAT rate is 5% for 2018 and 12.5% starting in 2026. I.R.C. § 59A(b).

28. Wells, *supra* note 26, at 1024 (calculating break point at 52.3%).

29. Daniel N. Shaviro, *The New Non-Territorial U.S. International Tax System*, 160 TAX NOTES 57, 58 (2018).

30. I.R.C. § 245A (providing a deduction for "the foreign-source portion of" a dividend from a foreign corporation to a "United States shareholder").

31. *Id.* § 951A(a) (requiring inclusion of GILTI in income).

32. *Id.* § 250(a)(1)(B) (providing 50% deduction initially); *id.* § 250(a)(3)(B) (providing 37.5% deduction starting after 2025).

33. *Id.* § 951A(b) (defining GILTI as "net CFC tested income" less "net deemed tangible income return"); *id.* §951(c)(2)(A) (defining "tested income"). The subtraction of foreign income taxed at 18.9% or more rests on I.R.C. § 951A(c)(2)(A)(i)(III), which cross-references I.R.C. § 954(b)(4), which defines income subject to high foreign taxes as income subject to tax "at a rate greater than 90 percent of the maximum rate of tax specified in section 11."

34. *Id.* § 250(a)(1)-(3).

35. *Id.* § 960(d).

A 50% deduction for GILTI initially seems to produce a 10.5% tax rate, and a 37.5% GILTI deduction a 13.125% rate.[36] But the effect of the GILTI minimum tax changes when the 80% credit for foreign taxes is considered. Consider the question under the strong assumption that the same rules determine the taxable base for purposes of GILTI and foreign taxes. Then, the 80% foreign tax credit means that the U.S. will reimburse a firm via reduction in GILTI liability at a rate of 80 cents for every dollar of foreign income tax paid until the foreign income tax rate reaches 13.125% (or about 16.4% after 2025).[37] After 13.125%, the foreign income tax will have fully offset GILTI, and the firm will fully bear the burden of any additional foreign tax liability. Or, as the Conference Report to the TCJA explains, "[A]s foreign tax rates on GILTI range between zero percent and 13.125 percent, the total combined foreign and U.S. tax rate on GILTI ranges between 10.5 percent and 13.125 percent."[38]

At that point – when the foreign tax rate reaches 13.125% – there is a discontinuity. The "marginal reimbursement rate" for the payment of foreign taxes abruptly drops, in a notch or cliff-like fashion, from 80% to 0% when the non-U.S. tax rate crosses the 13.125% line.[39] After that point, the total tax burden equals the foreign tax burden.

I argue more fully below that the GILTI structure supports the continued existence of the corporate tax globally at a rate of about 13.125%, increasing to about 16.4% after 2025. The nub of the argument is that the notch feature of the GILTI structure should encourage convergence at similar foreign tax burdens. The argument is a qualified one, as I explain below. Most importantly, whether it serves this goal will depend on how the United States implements the GILTI regime and how other jurisdictions respond to the regime.

Here then is a summary of the threads of post-TCJA international tax policy. Some of the TCJA's changes reduce the U.S. income taxes of multinational corporations. These include the new dual rate structure for U.S. income, including a 21% top rate and 13.125% for FDII. Congress appears to have adopted these decreases in the name of competitiveness, as discussed below.

---

36. The effective rate could be calculated as follows based only on the 50% deduction: § 11(b) rate * fraction of GILTI included in income = 21% * (1-.5) = 10.5%. Or, based on the 37.5% deduction: § 11(b) rate * fraction of GILTI included in income = 21% * (1-.375) = 13.125%.

37. Under the 50% deduction regime, the 10.5% U.S. tax on GILTI will be completely eliminated by an 80% foreign tax credit when the foreign tax rate equals 13.125%: 13.125% * 80% = 10.5%. Under the 37.5% deduction regime, the 13.125% U.S. tax on GILTI will be completely eliminated by an 80% foreign tax credit when the foreign tax rate equals 16.40625%: 16.40625% * 80% = 13.125%.

38. H.R. REP. NO. 115-466, at 499 (2017).

39. Shaviro, *supra* note 22, at 183.

Other TCJA changes tend to increase the corporate tax of multinationals. These include the BEAT and the GILTI minimum tax. The now-or-never structure of the TCJA means that the GILTI minimum tax will be due currently. This stands in contrast to the deferral of tax on non-Subpart F non-U.S. income under the maybe-later approach of prior law. Below, I argue that these tax increases have potential as cooperative measures. That is, they may strengthen the corporate tax globally by supporting other jurisdictions' corporate tax regimes.

II. COMPETITIVENESS AND THE TCJA

A. *TCJA "Competitiveness" Is an Open Question*

The TCJA adopts a "competitiveness" strategy based on a hypothesis that lower taxes attract investment,[40] and that these investments benefit the tax-lowering jurisdiction.[41] This hypothesis follows a deceptively simple logic: lower taxes result in larger before-tax profit on investment returns, and higher returns should attract capital. While Congress cited increased "competitiveness" as a reason for the TCJA's tax rate reductions,[42] there is a serious empirical debate about whether real corporate capital follows lower tax burdens around the globe. So the question of whether TCJA's tax reductions for U.S. income will attract real corporate capital investment to the United States is open.

The empirical debate proceeds along the following lines. Even assuming that competitiveness is a sensible goal,[43] there are many other considerations that affect productivity.[44] The role of tax in this collection of factors is disputed in the

---

40. *See, e.g.*, Eric Toder, *International Competitiveness: Who Competes Against Whom and for What?*, 65 TAX L. REV. 505, 527 (2012) (considering the ability of corporate rate reductions to increase capital invested in the United States).

41. *See* STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT xxvi (2010) ("[C]orporations are uniquely designed to accumulate retained earnings for large-scale investments that otherwise would be difficult to fund.").

42. *See, e.g.*, Mike DeBonis, *Senate GOP Budget Sets Obamacare Repeal Aside, Orders Tax Bill Drafted by November*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/09/29/tax-bill-to-be-drafted-by-november-according-to-senate-gop-budget/?noredirect=on&utm_term=.86e1da4f1dd9 [https://perma.cc/9DLS-YT2Y] (reporting Wyoming Senator Mike Enzi's call for "[a] pro-growth tax plan . . . [that] will . . . enhance America's competitiveness around the globe").

43. *See* Paul Krugman, *Competitiveness: A Dangerous Obsession*, FOREIGN AFFAIRS, March/April 2004, at 30 (rejecting the idea that a nation's productivity has to do with a zero-sum competitive game with other nations).

44. *See, e.g.*, Klaus Schwab, *The Global Competitiveness Report 2016-17*, WORLD ECON. F. 12 (2016), http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf [https://perma.cc/URJ5-WUBU] (listing 12 "pillars" of global empirical literature. It is clear that higher profits are allocated to a jurisdiction when the jurisdiction reduces tax burdens.[45] But a point of contention is whether these higher profits result from the allocation of real investment to the jurisdiction. Some work suggests that the higher profits do result from real investment shifts, for instance as measured by real assets or employment.[46] But other work suggests that the higher profits result from income shifting produced by tax planning.[47]

Evidence that lower tax rates encourage more real investment may support a competitiveness tax policy. Evidence that lower tax rates encourage more income-shifting, however, does not.[48] It is unlikely that lower rates would reverse income shifting enough to offset the tax revenue lost through the corporate rate cuts.[49] This helps explain why a $1.5 trillion deficit increase over ten years was

competitiveness including institutions, infrastructure, education, markets for goods, labor and finance).

45. *See*, *e.g.*, Kimberly A. Clausing, *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond*, 69 NAT'L TAX J. 905, 914 (2016) (surveying literature and finding semi-elasticity relationship between tax rate and profit of -1.85 to -4.61, with an average of -2.92); Dhammika Dharmapala, *What Do We Know About Base Erosion and Profit Shifting? A Review of the Empirical Literature*, 35 FISCAL STUD. 421, 430-32 (2014) (surveying literature and finding semi-elasticity rates of less than -1).

46. *See, e.g.*, Mihir A. Desai et al., *Foreign Direct Investment in a World of Multiple Taxes*, 88 J. PUB. ECON. 2727, 2739 (2004) (reporting results implying that 1% lower income tax rates are associated with .62% lower affiliate assets); James R. Hines, Jr., *How Serious a Problem is Base Erosion and Profit Shifting?*, 62 CAN. TAX J. 443, 446 (2014) (citing related literature). *See generally* Michael J. Graetz & Rachael Doud, *Technological Innovation, International Competition, and the Challenges of International Income Taxation*, 113 COLUM. L. REV. 347, 371-73 (2013) (summarizing empirical evidence that suggests a link between research and development tax credits and increased patent filings, but finding little support in the literature for the efficacy of other innovation tax incentives, including innovation boxes).

47. *See, e.g.*, Clausing, *supra* note 45, at 913 (finding no statistically significant relationship between tax rate and employment in a certain location); Harry Grubert, *Foreign Taxes and the Growing Share of U.S. Multinational Company Income Abroad: Profits, Not Sales, Are Being Globalized*, 65 NAT'L TAX J. 247, 257 (2012) (finding no statistically significant link between lower income taxes and higher sales in a jurisdiction); Thomas Torslov et al., *The Missing Profits of Nations* (Nat'l. Bureau Econ. Research, Working Paper No. 24701, 2018) (finding that at least 40% of multinational profits are shifted to low-tax countries in a typical year through tax planning).

48. One argument for reducing lower rates to respond to income shifting might invoke the advantage of freeing up tax planners to pursue projects that produce less deadweight loss than tax compliance, but it is difficult to establish what tax planners would do instead.

49. *See* Jane G. Gravelle, *Policy Options to Address Profit Shifting: Carrots or Sticks?* 152 TAX NOTES 121, 124 (2016) (explaining that empirical semi-elasticities imply that a corporate rate reduction that decreased revenue by one dollar would increase revenue by less than ten cents by reducing profit-shifting incentives).

necessary to finance the TCJA's corporate tax rate cut, which is forecast to cost \$1.3 trillion over ten years.[50]

With all this uncertainty about whether reducing corporate tax burdens improves competitiveness, it may be surprising that there has been bipartisan support for various plans for corporate tax rate reduction. To be clear, the Obama Administration did not advocate deficit financing. It said in 2012, without specifying how, that its proposed rate cut to 28% would be revenue-neutral, paid for by repealing corporate tax "loopholes" rather than by deficit financing.[51] But if such a revenue-neutral rate cut would neither increase nor decrease corporate tax burdens, why propose it, especially under the same "competitiveness" headline used by the Trump Administration?[52] One reason to favor such a proposal is supported by financial accounting research. Firms make decisions based on the accounting (not cash) measures of net profits, and reducing the top statutory rate directly reduces accrued financial accounting income tax expense and in turn increases net profits.[53] This may offer support for the idea that the TCJA's corporate rate cuts will increase investment into the United States through the influence of financial accounting on firms' decisions.

B. Competition and Cooperation in Parallel

States pursue simultaneously both competitive and cooperative global tax policy strategies. Individual OECD nations have competed, by reducing their jurisdictions' tax rates, at the same time as they cooperate, by banding together with other OECD nations to discourage and penalize allocations of income to tax havens. In 2000, according to the OECD, the United Kingdom's combined

---

50. *See* JOINT COMM. ON TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 3 (2018) (giving revenue estimate of (\$1.3485 trillion)). Tax increases, including the BEAT and the GILTI minimum tax, did not come close to covering this shortfall. *See id.* at 7 (estimating revenue increases of \$112.4 billion for the GILTI minimum tax and \$149.6 billion for the BEAT over ten years).

51. *See The President's Framework for Business Tax Reform*, WHITE HOUSE & DEP'T TREASURY 9 (Feb. 2012) https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/OTA-Report-Business-Tax-Reform-2012.pdf [https://perma.cc/8LK3-73P3] (proposing 28% rate and base-broadening reforms).

52. *See Obama Proposes Corporate Tax Cut and Says System Needs to Change*, ASSOCIATED PRESS (Feb. 22, 2012) https://www.theguardian.com/world/2012/feb/22/obama-proposes-corporate-tax-cut [https://perma.cc/XC9J-CEHN] (quoting Obama as advocating the plan's "competitiveness").

53. *See* John R. Graham, Michelle Hanlon & Terry Shevlin, *Real Effects of Accounting Rules: Evidence from Multinational Firms' Investment Location and Profit Repatriation Decisions*, 49 J. ACCT. RES. 137, 140 (2011) (stating survey research finding that for operation location decisions, "the importance of financial accounting expense deferral is as important statistically as the importance of cash tax deferral"); *id.* at 146-47 (reviewing literature reaching consistent results).

national and subnational tax rate was 30%, Canada's was 42.4%, and Germany's was 51.6%. In 2016, these rates were, respectively, 20%, 26.7% and 29.8%.[54] These rate reductions were competitive moves. But they were also accompanied by cooperative moves. During the same approximate time frame, in 1998, the OECD launched an effort which sought to blacklist tax havens; and in 2016 the OECD delivered its report on its "Base Erosion and Profit Shifting" program, which sought to allocate income to the location of "value creation," condition certain deductions on the material taxation of a corresponding income inclusion, and take other steps designed to discourage and penalize taxable income allocation to tax havens.[55]

The TCJA follows this trend of combining competitiveness and cooperation strategies. Taken to its logical end point, "competitiveness" implies eliminating the corporate tax. Yet the TCJA does not set the United States on a path toward that end. It presses rates to the lower end of the OECD range, but then supports these rates with de facto cooperative provisions.

III. COOPERATION AND THE TCJA

A. *Cooperation in International Tax Policy*

Cooperation among states can maintain positive corporate tax rates in a multijurisdictional setting. This is thought to be a good thing for several reasons. Populists support the corporate income tax as a method for regulating concentrated wealth.[56] Politicians appreciate it as a revenue raiser that does not appear to burden individuals,[57] although, of course, somehow it must. Tax policy experts believe that the corporate tax is one of few practical ways to tax income

54. *See Statutory Corporate Income Tax Rate*, *supra* note 11.

55. *See* Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311, 325-46 (identifying cooperative moves among OECD countries directed at tax havens, including the harmful tax competition project).

56. *See* Ajay K. Mehrohtra, *The Public Control of Corporate Power: Revisiting the 1909 U.S. Corporate Tax from a Comparative Perspective*, 11 THEORETICAL INQUIRIES L. 491, 498 (2010) (connecting "tension[] between American government and big business" with corporate taxation).

57. *See* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 103 (1990) (noting the 1909 Act's emphasis on corporation's separate and artificial "legal personality").

from capital[58]—which is the main advantage of an income tax as opposed to a wage or consumption tax.[59]

In the context of recent OECD history, "cooperate" has meant to target and punish tax haven planning through agreement among OECD countries.[60] The goal of cooperation then is to protect and maintain the corporate income tax in the OECD countries that have banded together. On the procedural meaning of "cooperate," an ex ante agreement about the terms of reciprocity might seem intuitive,[61] but global norms can substitute for such an approach.[62] The practice of nations granting foreign tax credits gained traction after a unilateral U.S. decision to do so around 1920.[63] Likewise, some parts of the TCJA—specifically the GILTI minimum tax and the BEAT—can be understood not as part of a prearranged agreement, but rather as unilateral de facto cooperative moves effected through statutory enactment. These provisions can further cooperation even if they were not intended to do so.

B. GILTI as a Cooperative Soak-Up Tax

The centerpiece cooperative element in the TCJA is the minimum tax on global low-taxed intangible income. The GILTI minimum tax applies to certain non-U.S. income earned by non-U.S. subsidiaries of U.S. shareholders in excess of a 10% imputed return on the adjusted basis of CFC tangible assets. From 2018 through 2025, 50% of the GILTI tax base is deductible, and starting in 2026,

---

58. *See, e.g.*, J. Clifton Fleming et al., *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 319-20 (2001) (arguing that the corporate tax is necessary because of the impracticality of taxing shareholders on a pass-through basis).

59. *See, e.g.*, Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 48 STAN. L. REV. 1413, 1417 (2006) ("As is well known . . . [i]n a consumption tax, the risk-free return to investing is exempt, while in an income tax, the return is taxed.").

60. *See* Faulhaber, *supra* note 55, at 325-46 (identifying the series of cooperative moves among OECD countries directed at tax havens).

61. *See* Allison Christians, *How Nations Share*, 87 IND L.J. 1407, 1442-52 (2012) (describing OECD approach that relies on negotiations among countries to arrive at "soft law," which members are invited to adopt).

62. *See generally* Daniel Shaviro, *Why Worldwide Welfare as a Normative Standard in U.S. Tax Policy?*, 60 TAX L. REV. 155 (2007) (exploring national welfare reasons for cooperative norms).

63. *See* Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1045-49 (1997) (noting the "generous" U.S. foreign tax credit enactment of 1918).

37.5% is deductible.[64] Eighty percent of foreign income taxes allocable to GILTI are creditable.[65]

As a first cut—without considering, for instance, expense allocation and foreign tax credit allocation questions[66]—the GILTI minimum tax is a tax that soaks up foreign taxes at a rate of 80 cents on the dollar, up to a foreign tax rate of 13.125% (or about 16.4% starting in 2026). This is consistent with legislative history that refers to 13.125% as "the minimum foreign tax rate, with respect to GILTI, at which no U.S. residual tax is owed by a domestic corporation."[67] As discussed above,[68] when a non-U.S. jurisdiction imposes a tax rate of up to 13.125% on the non-U.S. income of a subsidiary of a U.S. parent, the U.S. government absorbs 80% of that cost. But if a non-U.S. jurisdiction imposes a tax rate of over 13.125%, the U.S. government absorbs none of the incremental cost.

The discontinuity of the GILTI minimum tax when the foreign tax rate reaches 13.125% is a "notch" in the design of the tax. Notches or discontinuities in tax provisions are sometimes criticized as inefficient because notches or lines encourage convergence of behavior at the boundary of the discontinuity.[69] But in this situation, the notch structure of the GILTI minimum tax should be salutary, because its high salience can facilitate convergence on the corporate tax rate protected by the GILTI regime.[70] For the GILTI minimum tax, this suggests that foreign corporate income tax rates might converge at 13.125%.

The mechanism for convergence of a foreign tax rate at 13.125% could come from change in the law of foreign jurisdictions. For example, a foreign jurisdiction with an 8.125% tax rate might increase its rate to 13.125% because affected companies will only experience the foreign law change as a 1% rate hike on GILTI, not a 5% rate hike.[71] It is also possible that corporate tax planning will

64. I.R.C. § 250(a)(1)-(a)(3) (2018).

65. *Id.* § 960(d)(1).

66. H.R. REP. NO. 115-466, at 626 (2017).

67. *Id.* at 498.

68. *See* Part I.B *supra*.

69. *See* David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1661 (1999) (noting that if similar behavior is treated differently, a large incentive for taxpayers to change their behavior to the favorable side of a rule will result).

70. *See* Joel Slemrod, *Buenas Notches: Lines and Notches in Tax System Design*, 11 EJOURNAL TAX RES. 246, 278 (2013) (arguing that convergence of behavior around notches is generally inefficient but occasionally may be justified, for instance on administrative or salience grounds).

71. Before the change, a U.S.-parented multinational that earned $100 in GILTI attributable to the foreign jurisdiction would pay $8.125 to the foreign jurisdiction and credit 80% of that amount, or $6.50, against the otherwise due U.S. GILTI minimum tax of $10.50. The residual U.S. tax due would be $4, for a total of $12.125 prior to the foreign jurisdiction's law change. After the foreign law change, the foreign jurisdiction would impose tax of $13.125 on $100 and the U.S. would impose $0.

help achieve this convergence. A firm can use various strategies—including cross-crediting, base erosion planning, or taking advantage of a foreign jurisdiction's dual rate structure—to arrive at a tax burden of 13.125% on GILTI. The GILTI structure is flexible in accommodating different ways to get to that consensus level of corporate tax.

Criticisms of the GILTI regime have come from both the scholarly and practitioner communities. For instance, scholars argue that GILTI incentivizes U.S. firms to invest in tangible assets offshore in order to increase the amount of the exempt 10% imputed return.[72] Similar investments in the United States could produce a taxable return, depending on the application of depreciation and expensing provisions as well as the application of the FDII rules, which also include an exemption for a return on related tangible property.[73] Empirical work may eventually reveal whether the GILTI structure encourages offshoring.[74]

Scholars also point out that the GILTI minimum tax encourages firms to allocate taxable income to either a low-tax or high-tax non-U.S. jurisdiction, rather than to the United States.[75] This is in part because the law allows a firm to pool foreign tax credits from high-tax and low-tax jurisdictions to arrive at a 13.125% combined rate on GILTI. It is true that the GILTI minimum tax does not prioritize U.S. corporate income tax revenue. It instead encourages other countries to maintain their corporate taxes. It should be noted, though, that a firm might also be able to achieve a 13.125% tax rate on U.S. income, if that income is categorized as FDII.

Practitioners, including the financial accountants who must somehow estimate the tax expense accruals resulting from the GILTI tax, have found several uncertainties make the required computations difficult or impossible. These include uncertainty about expense allocation, the classification of foreign tax credits as GILTI or non-GILTI, and the order of GILTI versus Subpart F inclusions,

---

72. Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 Yale L.J.F. 339, 345 (2018) (noting that offshoring might "primarily be a problem when low-tax countries are a viable alternative").

73. *See supra* Part I.B.

74. Conflicting empirical work about whether lower tax rates attract real investment, *see supra* Part II.A, suggest that it is difficult to predict whether the 10% exempt return on tangible assets will encourage offshoring. In addition, the 10% return is calculated on the assets' basis, not value, and the basis will decline to account for depreciation deductions.

75. *See* Kimberly Clausing, *How the GOP's Tax Plan Puts Other Countries First*, FORTUNE (Nov. 20, 2017), http://fortune.com/2017/11/20/gop-tax-plan-donald-trump-america-first [https://perma.cc/V462-ZRG3].

among other issues.[76] Presumably because of all this uncertainty, some companies' financial accounting results suggest that GILTI will reduce their non-U.S. tax burden. Others suggest that GILTI will increase that burden.[77] Things may remain in limbo for the yearlong grace period established by the Securities and Exchange Commission (SEC) for firms to determine and correct their financial accounting results.[78]

None of this changes the fact that cooperation is at the heart of GILTI. GILTI builds on established U.S. cooperative moves: the foreign tax credit (FTC) and Subpart F. The FTC permits a U.S. taxpayer to reduce their U.S. income tax on a dollar-for-dollar basis to account for foreign income taxes paid on certain income, up to the applicable U.S. tax rate.[79] It aims to help multinationals that do business in countries that charge corporate income tax—not MNCs incorporated in tax havens. Subpart F, on the other hand, attempts to tax currently passive and mobile income earned by non-U.S. corporations owned by U.S. shareholders[80] and likewise aims to penalize firms that do business in tax havens, since the incentive is to place passive and mobile income in such low-taxed jurisdictions.[81]

By December 2017, neither the foreign tax credit nor the Subpart F rules worked as originally intended. MNCs could cross-credit high-taxed and low-taxed income at will. Subpart F was riddled with loopholes, including a check-the-box entity classification provision that allowed base-eroding interaffiliate payments to simply disappear for purposes of Subpart F.[82]

GILTI, together with the now-or-never taxation approach of the TCJA, provides more promising cooperation options compared to the FTC and CFC provisions of prior law. Under the GILTI minimum tax, a non-U.S. jurisdiction has a strong incentive to maintain a corporate tax burden at 13.125%, and firms have an incentive to accept such non-U.S. corporate tax burdens, because the U.S.

---

76. *See* Tax Section, *Report on the GILTI Provisions of the Code*, N.Y. State Bar Ass'n 34-35, 47-49, 65-70 (May 4, 2018), https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2018/1394_Report.html [https://perma.cc/FJ8K-KXTZ] (detailing technical problems and questions raised by GILTI rules).

77. *See* Alison Bennett, *'GILTI' Worries: Four Industries Facing Tax Base Erosion Provision*, Bloomberg Tax (May 9, 2018), https://www.bna.com/gilti-worries-four-n73014475780 [https://perma.cc/9352-5J82] (reporting on different companies' reaction to the GILTI rules).

78. SEC Staff Accounting Bulletin No. 118 (Dec. 22, 2017), https://www.sec.gov/interps/account/staff-accounting-bulletin-118.htm [https://perma.cc/SK2F-DCTM].

79. I.R.C. § 901 (2018).

80. *Id.* §§ 951-65.

81. *See* Brian J. Arnold, *A Comparative Perspective on the U.S. Controlled Foreign Corporation Rules*, 65 Tax L. Rev. 473, 483 (2012) (describing different countries' anti-deferral rules as measures that target benefits otherwise obtained through planning with low-tax jurisdictions).

82. *See supra* Part I.A.

foreign tax credit will offset 80% of the cost of that non-U.S. corporate tax to the firm. This is why it makes sense to say that the rate of tax on the foreign income of U.S. multinationals should converge at 13.125% even though under the prior law's maybe-later approach it did not make sense to say that the rate of tax on the non-U.S. income of U.S. corporations was 35%.

Before the TCJA, non-U.S. jurisdictions were incentivized to reduce their non-U.S. tax rates down toward 0%, as the stateless income stories show, because the United States charged as little as 0% on non-U.S. income on a current cash basis and the threat of future 35% taxation was, well, only a threat. In contrast, the "now or never" approach of the TCJA means that foreign taxes incurred by non-U.S. subsidiaries produce immediately usable tax credits, without the overhang of uncertainty about future U.S. repatriation policy. It is true that there is regulatory uncertainty now, for instance about foreign tax credit classification, loss carryovers, and deduction allocation. But when those questions are sorted out, tax expense will be calculated much more promptly, as the relevant income and deduction items accrue and as foreign taxes are paid.

Firms' ability to cross credit, or pool high-tax and low-tax income, increases the protection offered for other states' corporate income tax systems. For instance, a non-U.S. subsidiary with operations in a country with a 26.25% tax rate might base-erode half the resulting profit to a tax haven. After doing so, the combined rate would be a fully creditable 13.125%. Despite the bad optics of endorsing continued allocations to tax havens, the result is consistent with the structure of the GILTI minimum tax. It supports non-U.S. corporate tax at a rate of 13.125%. The non-U.S. jurisdiction will raise the same amount of revenue, and the United States will collect no tax, whether the non-U.S. jurisdiction maintains the 26.25% rate and allows base erosion of half the profit, or eliminates the allocation of income to the tax haven and charges a 13.125% rate.[83]

There are other ways for firm operating in a non-U.S. jurisdiction to reach an effective 13.125% rate. For example, the United Kingdom's patent box establishes a dual corporate income tax rate with a 19% headline rate and a 10% rate for patent box income. If a U.K. subsidiary has a mix of regular and patent box income, it might arrive at a 13.125% rate. Presumably, the United States will still give a credit for 80% of that foreign tax under the GILTI rules.

A foreign jurisdiction might also facilitate firms' convergence on the GILTI notch rate of 13.125% by lowering the regular corporate tax rate and increasing a country's reliance on consumption or personal income taxes. Or it might supplement the regular corporate tax with a penalty tax such as the U.K.'s diverted

83. *Cf.* Daniel N. Shaviro, *Ten Observations Concerning International Tax Policy*, 151 TAX NOTES 1705, 1706 (2016) (noting that "for residence countries, foreign-to-foreign profit shifting is normatively ambiguous").

profits tax, which might apply, for instance, to income related to sales to domestic consumers. The United States would still give an 80% credit for the payment of these corporate income taxes—again, only up to 13.125% on income identified as GILTI.

C. *How the BEAT Targets Tax Havens*

The BEAT is a minimum tax that penalizes excessive deductible payments, such as interest and royalties, made by certain U.S. firms to related non-U.S. firms. The BEAT initially applies at a rate of 10%, and it has an alternative base calculated by adding back most categories of related-party deductible payments (though not inventory cost-of-goods-sold items, which offers a potentially large loophole). At a 10% BEAT rate, and assuming that a 21% regular tax rate applies, the BEAT allows a U.S. firm to use related party payments to reduce taxable profit by more than half before facing any BEAT liability.[84]

The BEAT belongs to a larger extended family of anti-avoidance provisions that seek to protect a home country's tax base. It is similar to thin capitalization rules that disallow interest deductions above a certain threshold.[85] It resembles the provision in the United Kingdom's diverted profit tax that imposes a punitive tax rate on certain tax-motivated royalties or other deductible payments made by a U.K. firm.[86] As another example, the Australian Multinational Anti-Avoidance Law seeks to re-attribute to Australia certain income derived by multinationals from sales to Australian consumers.[87]

The BEAT is facially neutral. That is, it applies when deductible payments are made to any foreign affiliate, not only to affiliates located in no-tax or low-tax jurisdictions. Nevertheless, the BEAT generally should operate as an anti-

---

84. *See supra* Part I.B.

85. *See* Jennifer Blouin et al., *Thin Capitalization Rules and Multinational Firm Structure* 7 (IMF Working Paper No. 14/12, 2014), https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Thin-Capitalization-Rules-and-Multinational-Firm-Capital-Structure-41275 [https://perma.cc/8PRR-L8L2] (reporting on a data set including 54 countries' thin capitalization rules).

86. *See* Diverted Profit Tax Guidance, HM REVENUE & CUSTOMS 13 (2015) (U.K.), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480318/Diverted_Profits_Tax.pdf [https://perma.cc/HL74-W5AX] (providing a tax-motivated royalty example).

87. *See* Explanatory Memorandum, Tax Integrity Multinational Anti-Avoidance Law 2015 (Cth) 3 (explaining that the Multinational Anti-Avoidance Law would reattribute certain income related to sales to Australian customers).

tax-haven provision. This is partly because a firm faces a greater incentive to make deductible payments from a U.S. affiliate to a tax haven affiliate.[88]

The BEAT also should function as an anti-tax haven measure because the BEAT features a discontinuous structure typical of minimum taxes. The BEAT penalizes covered deductible payments to higher-tax affiliates only if these deductions exceed half the otherwise calculated profit. In other words, it protects deductions up to a bit more than 50% of otherwise calculated taxable income. As a conceptual matter, the BEAT's protection should extend first to deductible payments to higher-taxed affiliates, since they are more likely to be business-motivated deductions of the kind meant to be protected, not penalized.[89] In other words, deductions to higher-taxed affiliates conceptually should be stacked first. Additional deductions to tax havens stack second, so that if the BEAT applies to penalize deductions, it should be understood to penalize the tax haven deductions.

IV. THE FUTURE OF THE TCJA

Questions remain regarding the implementation—whether through guidance, accounting interpretations, or perhaps a follow-up statute—of the TCJA's international provisions. One aim should be to rationalize the GILTI minimum tax's apparent objective with sensible and careful deduction allocation, foreign tax credit ordering, and other rules. The Treasury Department, and in some cases Congress, can write rules that leave corporate taxpayers less room for planning, and they should seek to do so—in contrast, for instance, to existing transfer pricing rules. Taxpayers have a strong incentive to tax plan in order to hit the GILTI notch rate of 13.125%, and they may well figure out how to do that without generous expense allocation or foreign tax credit ordering regulations. Congress and the Treasury Department also should seek to close the loopholes in the BEAT that now allow firms with less than $500 million in annual revenue, as well as

88. Such deductible payments are in part responsible for the enormous profits booked in tax havens. In Bermuda, for example, the reported profits of U.S. subsidiaries equal about 1700% of total country GDP, see *American Corporations Tell IRS that Sixty-One Percent of Their Offshore Profits Are in Ten Tax Havens*, INST. ON TAX'N & ECON. POL'Y 2 (2017) https://itep.org/wp-content/uploads/corpoffshore1117.pdf [https://perma.cc/AF3B-G4LR], and more than 700% of total compensation paid to all employees, see, for example, Richard Rubin, *Corporations Push Profits into Tax Havens as Countries Struggle in Pursuit, Study Says*, WALL ST. J. (June 10, 2018), https://www.wsj.com/articles/corporations-push-profits-into-tax-havens-as-countries-struggle-in-pursuit-study-says-1528634659 [https://perma.cc/EFA8-X2W5].

89. *See* Wells, *supra* note 26, at 1028 (noting that the BEAT "follows a well-worn path in that it only restricts the financial benefits of excessive base erosion payments . . . that would reduce the allocable share of the combined profits by more than 50 percent").

deductible affiliate payments characterized as cost of goods sold, to escape the BEAT net.

Another open question is how other nations will respond to the TCJA. Will they appreciate the structure that supports their corporate tax systems? Some may appreciate the structure, but not the relatively low rate that is supported for non-U.S. states' corporate tax systems—in other words, 13.125% now and about 16.4% starting in 2026. Will other OECD nations with relatively high corporate tax burdens seek to work within this framework? Might they seek to encourage the United States to increase the level at which it supports the global corporate tax? How will this interact with other nations' decisions regarding whether to challenge the FDII provisions of the TCJA as violations of WTO rules or OECD treaty guidance?

More broadly, the TCJA's combination of competitiveness and cooperation provides a more serviceable international tax law framework for the United States going forward. The TCJA introduces the implementation of U.S. international tax policy through now-or-never tax rates that translate more directly to financial accounting. It explicitly engages base erosion through the BEAT, and it provides more effective support for other countries' corporate income taxes through the GILTI minimum tax structure. These developments make it easier for the United States to coordinate global tax policy with trading partners.

But this is not to say that the TCJA got everything right. Indeed, Congress may have gotten its headline items—including the tax rates themselves—wrong. The top rate cut to 21% and the choice of 13.125% as the initially supported rates for FDII and GILTI are low. These rates sacrifice a lot of revenue for a hoped-for economic boost that is not guaranteed, and they bear the heavy burden of deficit financing.

Yet even if the TCJA drew lines too generously, unnecessarily favoring corporate taxpayers, at least it drew lines–including the GILTI minimum tax and the BEAT—that support the continued existence of the corporate income tax. The top statutory rate, the FDII effective rate, and the GILTI effective rate are all policy dials that can be adjusted in the future, while preserving the TCJA's approach to supporting the global corporate income tax.

CONCLUSION

The TCJA plays both sides of the global tax policy game. It pursues a competitiveness strategy, in the face of conflicting empirical evidence, by drastically lowering tax rates. But there are limits to the TCJA's competitiveness. It adopts one scheme, the GILTI minimum tax, that protects other countries' corporate taxation of the non-U.S. income of U.S. multinationals, up to a rate of 13.125% (and about 16.4% starting in 2026). Its anti-base erosion provision, the BEAT, also pursues de facto cooperation with other OECD countries by penalizing payments to tax haven affiliates. After the TCJA, the U.S. framework has more elements in common with other OECD countries. Because of this, the framework of international corporate tax is sturdier today. The details of U.S. implementation and the response of other nations to the combination message of competitiveness and cooperation offered by the new U.S. law remain to be seen.

Susan C. Morse is the Angus G. Wynne, Sr. Professor of Civil Jurisprudence at the University of Texas School of Law. *Thanks for helpful exchanges and comments to Kimberly Clausing, Calvin Johnson, Rebecca Kysar, Robert Peroni and Stephen Shay.*