Statement of David M. Schizer
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before the House Ways & Means Committee Subcommittee on Tax
at a hearing
"Biden's Global Tax Surrender Harms American Workers and Our Economy"
July 19, 2023

Chairman Kelly, Ranking Member Thompson, and distinguished members of the Subcommittee–

Thank you for inviting me to this hearing on the Pillar Two agreement,[1] brokered by the OECD,[2] which imposes a global minimum tax on large multinationals.[3]

Everyone here knows how complicated our international tax system is, but some things are very simple–or, at least they should be. Today I will make two simple points:

- First, in the United States, taxes must be imposed by Congress, not the President.

- Second, the tax policy of the United States should be set by the United States, not by other countries.

Unfortunately, in joining the Pillar Two agreement in October 2021, the Biden Administration has strayed from both of these simple principles. Proceeding without congressional approval, they have given other countries significant influence over our tax system.

I. Congress's Constitutional Role

As everyone here knows, Congress has not enacted a global minimum tax that satisfies Pillar Two's criteria. In theory, committing to Pillar Two does not actually

[1] This Testimony is adapted from David M. Schizer, Biden and the OECD's Taxation Without Representation, Wall St. Journal, July 2, 2023.
[2] The Organisation for Economic Cooperation and Development ("OECD") is a Paris-based nongovernmental organization. *See generally* OECD, Who We Are, https://www.oecd.org/about/.
[3] As Treasury Secretary Janet Yellen explained when the U.S. joined Pillar Two, the U.S. and other nations "agreed to a new and specific set of provisions to uniformly tax the income of multinational companies, including a global minimum tax." Statement from Secretary of the Treasury Janet L. Yellen on the OECD Inclusive Framework Announcement, Oct. 8, 2021.

require a country to enact this tax, so Congress supposedly is free not to do so.[4] But in practice, there is a steep price for not enacting the right kind of minimum tax: other countries will be able to collect (and keep) this tax when the relevant roles go into effect.[5]

For example, let's say a U.S. multinational like Apple has an effective tax rate of less than 15% on its U.S. income (as measured under Pillar Two's "GloBE rules"), which can happen, for instance, when Apple claims various tax incentives under U.S. law (like bonus depreciation[6] or FDII).[7] In this situation, Pillar Two gives other countries like France or Germany the right to make up the difference, collecting (and keeping) the tax that Congress has chosen not to impose.[8]

These top-up taxes put Congress in a difficult position. The message essentially is, "Adopt a Pillar Two minimum tax, or other jurisdictions will do it for you." Is this a real choice? By analogy, think about a nonprofit that asks for a donation, which is supposed to be voluntary, but then adds: "If you don't give us the money, those big guys over there will take it from you."

This pressure is all the more inappropriate because the U.S. *already has* three minimum taxes in place: GILTI,[9] BEAT,[10] and CAMT[11] Indeed, the U.S. led the way in enacting this sort of minimum tax, but these taxes don't satisfy the OECD's criteria.

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[4] OECD/G20 Base Erosion and Profit Shifting Project, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy 9 (Oct. 2021) ("The GloBE rules will have the status of a common approach. This means that IF members: are not required to adopt the GloBE rules [and] accept the application of the GloBE rules applied by other IF members . . .").

[5] The UTPR will apply in 2025 in the EU and many other countries. But a "transitional safe harbor," which was announced on July 17, 2023, gives more time to countries with a statutory corporate rate above 20% (including the U.S.). This safe harbor will last through fiscal years beginning on or before the end of 2025. OECD, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two) 89-90 (July 2023), www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two-july-2023.pdf.

[6] *See* I.R.C. § 168(k).

[7] *See* I.R.C. § 250.

[8] Under a so-called "undertaxed profits rule" or "UTPR," every country where a multinational has a presence is authorized to tax the (undertaxed) domestic earnings of the multinational's parent company. *See* OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two) 12-14 (2021); *see also* OECD/G20 Base Erosion and Profit Shifting Project, The Pillar Two Rules in a Nutshell 4 (2021) (discussing interaction of qualified domestic minimum top-up tax ("QDMTT"), income inclusion rule ("IIR"), and untaxed profit rule ("UTPR")).

[9] *See* I.R.C. § 951A.

[10] *See* I.R.C. § 59A.

[11] *See* I.R.C. § 55 & § 56A.

We would be in a different place if the Biden Administration had insisted that the U.S. would join Pillar Two if–and only if–the minimum taxes we already had were sufficient. After all, the U.S. has significant bargaining power as the world's largest economy and, for that matter, as the OECD's largest contributor.[12] But unfortunately, this is not what happened.

Instead, the Administration has significantly undercut Congress's ability to make an independent choice about Pillar Two. This is not the way taxes are supposed to be imposed in this country.

Under the Constitution, only Congress has the "Power To lay and collect Taxes."[13] Tax bills originate in the House,[14] whose biennial elections help ensure that it reflects the people's will. This division of labor is the expression of a fundamental idea, "no taxation without representation," which has been a sacred commitment since this country was founded.[15]

This means the President can't just rewrite the tax law on his own. For example, the U.S. had one of the highest corporate tax rates in the world until Congress cut it from 35% to 21% in the Tax Cuts and Jobs Act. But if Congress had voted down this measure, could the Trump Administration have done this on their own, announcing that they would collect only a 21% tax? Obviously not. In this situation, all a President can do is make the case to the American people, asking them to elect a different Congress.

The same is true for the Biden Administration. The right way to change our minimum tax regimes is to appeal to Congress–or, if they say "no," to voters–not to an international organization.

II. Sovereignty

This brings us to my second point. Should we really give the OECD so much influence over these decisions? We are now in the awkward position that the U.S. has one set of minimum taxes, the OECD has another, and these regimes aren't in synch. This pressures the U.S. to revise our rules, if only to spare U.S. businesses from double

[12] *See* OECD, Member Countries' Budget Contributions, https://www.oecd.org/about/budget/member-countries-budget-contributions.htm (noting that U.S. contribution represents 19.1% of budget and that next largest contribution comes from Japan, which represents 9% of budget).

[13] U.S. Const., art. I § 8.

[14] U.S. Const, art. I § 7.

[15] This is not to say that the Executive Branch plays no role in tax policy. The Executive Branch proposes budgets, vetoes tax legislation, and enforces the law. Congress also has delegated to the Executive Branch the important responsibility to clarify specific statutory provisions with regulations.

taxation. As the Joint Committee has recently shown, the U.S. also is going to lose a great deal of revenue because of Pillar Two.[16]

Some might call it unfair to blame the Biden Administration for what other countries do. For example, if Apple wants to do business in France, Apple chooses to be subject to whatever taxes France imposes on income earned there.

But Pillar Two does more than that. Under one of the top-up taxes (the "undertaxed profit rule" or "UTPR"), France can collect tax from Apple's French subsidiary–based not just on the *French subsidiary's income in France*–but also on the *U.S. parent's income in the U.S*.

To see how aggressive this rule is, imagine that you live in Virginia (where you earn a good living) and your daughter lives in California (where she doesn't earn much money). Obviously, it is appropriate for Virginia to tax you, since that's where you live and earn money. But should California also be able to tax you through your daughter? Specifically, should California be able to impose a tax on your daughter, which is not based on what *she* earns in California, but based on what you--who are *not a California resident*--earn *in Virginia*? In essence, this is what a UPTR does.

When faced with this sort of overreach, the Administration should push back and threaten retaliation (as, indeed, the House has done).[17] But in committing to Pillar Two, the Administration essentially pledged *not to object* to this overreach (and arguably encouraged it).[18] So we aren't just talking about the choices of *other countries*. We are also talking about choices of *this Administration*.

III. A Problematic Precedent

Is it really a good idea for the president to pressure (and, indeed, to circumvent) Congress through a deal with an international organization? No doubt this tactic would appeal less to the Biden Administration if used to advance policies they don't favor.

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[16] Joint Comm. on Taxation, Possible Effects of Adopting the OECD's Pillar Two, Both Worldwide and in the United States (June 2023), https://www.finance.senate.gov/imo/media/doc/118-0228b_june_2023.pdf (projecting that U.S. will lose over $120 billion of revenue if rest of world adopts Pillar Two but U.S. does not, and that U.S. will lose $56 billion if U.S. also adopts Pillar Two).

[17] *See Ways and Means Republicans Introduce Bill to Combat Biden's Global Tax Surrender*, May 25, 2023, https://waysandmeans.house.gov/ways-and-means-republicans-introduce-bill-to-combat-bidens-global-tax-surrender/.

[18] By committing to Pillar Two, countries "accept the application of the GloBE rules applied by other IF members." OECD/G20 Base Erosion and Profit Shifting Project Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy 9 (Oct. 2021) (observing that Pillar Two is "common approach" and explaining what this involves).

For example, if President Biden is not reelected in 2024, a Republican administration might use the same playbook to undercut legislation the Biden Administration strongly favors: the clean energy tax credits enacted last summer.

Imagine that a U.S. multinational with an effective tax rate of 15% on its U.S. income (as calculated under the GloBE rules) is considering whether to invest in clean energy–and, thus, whether an energy credit would reduce its tax further. Will the energy credit trigger a UTPR, so countries like France or Germany can take back whatever tax savings these energy credits offer? If the answer is "yes," the energy credit will no longer provide any tax benefit. As a result, the credit won't motivate the company to invest in clean energy.

Let's say the next president doesn't like these energy tax credits and asks Congress to repeal them. If Congress refuses, the new president could turn to the OECD and urge it to apply the UTPR to these credits. At least some OECD members might well be pleased to do this; for example, France, Germany, Japan, and South Korea have strongly criticized some of these credits for being available only for technology made in the U.S. (or in a small group of other countries that doesn't include them). So like the Biden Administration, the next president might well persuade the OECD to provide an outcome that Congress won't adopt.[19] As the old saying goes, "what goes around, comes around."

The better course is to respect Congress's constitutional role. If Congress won't adopt the Administration's proposals, the President should seek recourse from voters. This approach—"taxation *with* representation"—is the way our democracy is supposed to work.

[19] The OECD gave the Biden Administration good news earlier this year, and again earlier this week. *See* OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global AntiBase Erosion Model Rules (Pillar Two) 63 (Feb. 2023), https://www.oecd.org/tax/beps/agreed-administrative-guidance-for-the-pillar-two-globe-rules.pdf (noting that concept of "Qualified Flow-through Tax Benefits" offers neutral treatment to certain tax equity structures); OECD/G20 Base Erosion and Profit Shifting Project, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global AntiBase Erosion Model Rules (Pillar Two) 25-39 (July 2023) (providing guidance on transferable credits). Yet the OECD might find ways to modify this guidance if the next Administration wants less favorable treatment.