Curbing Multinational Digital Tax Avoidance with The General Anti-Avoidance Rule

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Abstract

Large multinational companies (MNCs) are increasingly leveraging the enormous value embedded in the global digital economy. This has resulted in numerous innovations; however, it las likewise resulted in the loss of billions of dollars in tax revenue to governments due to outdated laws that generally assume a brick-and-mortar economy and residence-based taxation. Governments have tried to respond with a multitude of efforts to capture lost revenue and update tax laws to meet the realities of the digital era, but with only partial success. Resistance from MNC's and disagreements amongst national governments have resulted in significant delays and half-hearted responses. The result is that current laws do not sufficiently capture lost tax revenue from an increasingly valuable digital environment.

This article proposes that a robust general anti-avoidance rule (GAAR) can help alleviate the problem of costly tax avoidance by MNCs. A GAAR is a mechanism that gives governments a general power to deny taxpayers the tax benefit of a transaction when the transaction's primary purpose is merely to circumvent the payment of taxes. This manuscript defines the GAAR, presents the advantages and disadvantages of adopting GAARs, and shows how GAARs can be particularly effective in civil law systems. This manuscript then highlights New Zealand's GAAR as a model of effective drafting and enforcement to stop tax avoidant behavior. Finally, this manuscript presents several carrots and sticks, with particular emphasis on a regime enacted in the UK that specifically deters serial tax avoiders, that can further strengthen GAARs introduced at the national level. The manuscript concludes that GAARs, utilized effectively and enacted in conjunction with strong tax laws, are a necessary and important tool for optimizing enforcement of legitimate tax laws in an increasingly global and digital economy.

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Introduction

The digital economy is transforming modern business models. Historically, companies were entirely dependent on traditional brick-and-mortar spaces and personal interactions to generate income.[1] Today, economic activity is not dependent on fixed building structures or a business's established physical presence; instead, the modern digital economy relies on global hyperconnectivity between individuals, organizations, devices, data, and the Internet of Things.[2]

In 1996, global marketing experts Don Peppers and Martha Rogers professed that "[T]he marketer with the greatest scope of information about that particular customer…will be the more efficient competitor."[3] Such epiphany coincided with the emergence of digital advertising, where

[1] Shivam Singh, *Evolution of Business Model In Digital Age*, VESTA BUS. STUDIOS (Jan. 4, 2024), https://vestabusinessstudio.com/evolution-of-business-model-in-digital-age/.
[2] *What is the Digital Economy*, DELOITTE (Apr. 19, 2021), https://www.deloitte.com/mt/en/Industries/technology/research/mt-what-is-digital-economy.html.
[3] DON PEPPERS & MARTHA ROGERS, THE ONE TO ONE FUTURE: BUILDING RELATIONSHIPS ONE CUSTOMER AT A TIME, 139 (Doubleday 1996). Peppers and Rogers are two of the world's leading authorities on Customer Experience and Engagement. For more information, *see Don Peppers & Martha Rogers*, SPEAKINC, https://www.speakinc.com/speakers/don-peppers-martha-rogers/ (last visited Nov. 13, 2024).

companies track, capture, and exploit individuals' personal data;[4] siphoning it through a matrix of "invisible supply chains" that generate billions of dollars in global revenue.[5] In just a few short decades, big data has become a big business. Large multinational companies (MNCs)—generally identified as large corporations that incorporate in one country, while producing or selling goods in other countries[6]—have reinvented the modern business model, leveraging rapidly emerging technologies to drive innovation, increase customer convenience, minimize operational costs, and increase competitive advantage.[7] By 2025, about 30 percent of all business activity is expected to be conducted online.[8]

Evolving business models are making it difficult for global jurisdictions to identify precisely where income derives from that would ultimately allow them to tax it under generally accepted tax principles.[9] Traditional tax laws—commonly reliant upon long-standing brick-and-mortar physical presence standards—do not adequately address the challenges of the digital economy, thus allowing companies like Google, Meta, and Amazon to escape taxation by generating revenue in multiple jurisdictions without establishing a physical presence.[10] Indeed, MNCs structure their businesses in ways that allow them to incorporate in low-tax jurisdictions, remotely operate in others, and then shift profits out of higher-tax jurisdictions where the activities that actually *create* such profits occur, to lower tax jurisdictions where they are incorporated.[11]

Internationally, countries have attempted to respond to tax competition among lower-tax jurisdictions by reducing corporate income tax rates.[12] The United States initiated such effort via the Tax Cuts and Jobs Act (TCJA) in 2017, which reduced the corporate income tax rate from 32

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[4] *See* Janine S. Hiller & Lindsay Sain Jones, *Who's Keeling Score?: Oversight of Changing Consumer Credit Infrastructure*, 59 AM. BUS. L.J. 61, 62 (2022) (noting, "Americans, in large part, neither consent to nor have the right to opt out of data collection, which may start in childhood.").

[5] *See* Derek Thompson, *Why Surveillance Is the Climate Change of the Internet*, THE ATLANTIC (May 9, 2019), https://www.theatlantic.com/ideas/archive/2019/05/crazygenius-season-three-privacy-internet/589078/; s*ee also* Jurgita Lapienyte, *Tech giants endlessly exploit our data. Who will put an end to it?*, CYBERNEWS (Mar. 14, 2022), https://cybernews.com/editorial/tech-giants-endlessly-exploit-our-data-who-will-put-an-end-to-it/ (noting the cybersecurity issues that arise when data is shared between service providers and third parties without proper security protections).

[6] *Multinational Corporation*, CFI, https://corporatefinanceinstitute.com/resources/management/multinational-corporation/ (last visited Nov. 13, 2024).

[7] Bernard Marr, *The Impact of Digital Transformation on Business Models: Opportunities and Challenges*, FORBES (Oct. 12, 2023), https://www.forbes.com/sites/bernardmarr/2023/10/12/the-impact-of-digital-transformation-on-business-models-opportunities-and-challenges/.

[8] *Percentage of Business Conducted Online*, IBIS WORLD (Aug. 22, 2024), https://www.ibisworld.com/us/bed/percentage-of-business-conducted-online/88090/.

[9] Andrew Appleby, *Subnational Digital Services Taxation*, 81 MD. L. REV. 1, 2 (2021) ("The amorphous, cross-border nature of the digital economy makes adequate taxation even more difficult because there is often no clear answer as to which jurisdiction may impose tax and to what extent.").

[10] Julien Chaisse, *Toward A Big Bang For the Taxation of The Digitalized Economy: Business Retrospective, Perspective, and Prospective*, 41 VA. TAX REV. 345, 358 (2022); *see also* Reuven Avi-Yonah, Young Ran (Christine) Kim, and Karen Sam, *A New Framework for Digital Taxation*, 63 HARV. INT'L L.J. 279, 280 (2022).

[11] Graeme S. Cooper, *Implementing BEPS, or Maybe Not – the Australian Experience One Year On*, NZ L. REV. 145, 147 (2017).

[12] Kimberly A. Clausing, *Taxing Multinational Companies in the 21st Century*, BROOKINGS, at 238 (Jan. 28, 2020), https://www.brookings.edu/wp-content/uploads/2020/01/Clausing_Book_LO_FINAL.pdf.

to 21 percent, introduced a 10 percent minimum tax to curb tax avoidance,[13] implemented a tax that targets offshored intellectual property (IP),[14] and enacted a special deduction to incentivize companies to keep intellectual property in the United States.[15] Such efforts have done little to curb profit shifting.[16] A 2022 National Bureau of Economic Research Working Paper found that since the TCJA's inception, profits booked oversees by United States corporations decreased just 3 to 5 percent.[17] In addition, The Center on Budget and Policy Priority estimates that each U.S. state loses between $10 and $15 billion annually in tax revenues due to corporate profit shifting.[18] Similarly, the Tax Justice Network issued a 2023 report finding that globally, countries lose about $480 billion in annual tax revenue from profit shifting activities.[19]

Difficulties in capturing and taxing MNCS's profits has prompted global jurisdictions to increase tax collection efforts.[20] The European Union (EU) has been particularly active, advocating for unified global tax reform of the digital economy.[21] However, such idea faces resistance because of purported targeting of large U.S. tech corporations.[22] Undeterred, the Organization for Economic Co-operation and Development (OECD) and G20[23] initiated the base erosion and profit shifting (BEPS) project to address the tax challenges of the digital economy.[24] The BEPS project—which first emerged in 2013, and was subsequently refined in 2021[25]—has been hailed as "one of the most important recent developments in international taxation."[26] It seeks to narrow

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[13] Jacob Hartzler, *The Revival Of The Corporate Alternative Minimum Tax: Sound Policy In The Global Effort To Combat Base Erosion And Profit Shifting?*, 24 J. HIGH TECH L. 749, 752-53 (2023) (referencing to the base erosion and anti-abuse tax (BEAT)).

[14] *Id*. at 753 (referencing to the global intangible low-taxed income (GILTI)).

[15] *Id*. (referencing to the foreign-derived intangible income (FDII) deduction).

[16] Clausing, *supra* note 12, at 237; *see also* Javier Garcia-Bernardo, Petr Janský, & Gabriel Zucman, *Did The Tax Cuts And Jobs Act Reduce Profit Shifting By US Multinational Companies?*, NBER WORKING PAPER SERIES, at 3 (May 2022), https://www.nber.org/system/files/working_papers/w30086/w30086.pdf (noting that the share of profits shifted has only decreased by 3-5 percentage points since the TCJA's passage).

[17] Garcia-Bernardo et al., *id*. at 3.

[18] Michaeel Mazerov, *Policy Brief: States Can Fight Corporate Tax Avoidance by Requiring Worldwide Combined Reporting*, CTR. ON BUDGET AND POL'Y PRIORITIES (Mar. 29, 2024), https://www.cbpp.org/research/state-budget-and-tax/states-can-fight-corporate-tax-avoidance-by-requiring-worldwide.

[19] *World to lose $4.8 trillion to tax havens over next decade unless UN tax convention adopted, countries warned*, TAX JUST. NETWORK (July 25, 2023), https://taxjustice.net/press/world-to-lose-4-7-trillion-to-tax-havens-over-next-decade-unless-un-tax-convention-adopted-countries-warned/.

[20] Jingyi Wang, *A New Pillar To Address Tax Challenges Arising From Digitalization Of The Economy: Consensus-based Digital Services Taxes?*, 26 FLA. TAX REV. 197, 202 (2023).

[21] *See* Young Ran (Christine) Kim, *Digital Services Tax; A Cross-Border Variation Of The Consumption Tax Debate*, 72 ALA. L. REV. 131, 135-36 (2020).

[22] *See, e.g.,* David Shepardson, *Google, Facebook, Amazon to testify in U.S. against French digital tax*, REUTERS (Aug. 13, 2019), https://www.reuters.com/article/us-france-tax-usa-idUSKCN1V3254 (referring to companies like Amazon, Facebook, Apple Inc., and Google).

[23] G20 refers to the Group of Twenty premier forum for international economic cooperation. For more information on the G20, *see G-7 and G-20*, U.S. DEPT. OF THE TREAS., https://home.treasury.gov/policy-issues/international/g-7-and-g-20 (last visited Oct. 30, 2024).

[24] Arthur J. Cockfield, *Tax Wars: How to End the Conflict Over Taxing Global Digital Commerce*, 17 BERKELEY BUS. L.J. 353, 376 (2020) (noting that aspects of the OECD BEPS project work to capture income deriving from the digital economy).

[25] *See* Wei Cui, *New Puzzles in International Tax Agreements*, 75 TAX L. REV. 201, 208 (2022).

[26] Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/ G20 BEPS Inclusive Framework Membership*, 47 YALE J. INT'L L. 199, 200 (2022).

the gaps in international tax laws that corporations exploit to their advantage.[27] In its current form, the BEPS project endeavors to (1) alleviate historic corporate physical presence standards, and (2) impose a global minimum tax on MNCs to mitigate tax competition among jurisdictions.[28] While there is some consensus among countries that global tax reform is necessary,[29] the United States remains uncommitted.[30]

Stalls in implementing the BEPS project have resulting in unilateral action by select jurisdictions to enact various forms of digital service taxes (DSTs) that target revenues derived from digital services, like digital advertising, online marketplaces, and the sale of personal data.[31] At least 18 countries,[32] and one U.S. state, have implemented some variety of DST.[33] However, concerns have been raised that addressing the profit-shifting tax conundrum through non-uniform efforts like DSTs could lead to issues of double taxation.[34] The BEPS project, and individually-enacted DSTs, are incomplete solutions to solving global concerns of profit shifting without the accompaniment of more future-minded, sustainable support.

This article proposes that the introduction of strong and effectively enforced GAARs can significantly facilitate the enforcement of current tax laws and deter MNCs from the most egregious tax avoidant practices. A GAAR is a general rule that uses broad language to prohibit the use of transactions for the primary purpose of circumventing tax obligations.[35] GAARs attempt to deny the tax benefits of transactions that are a sham, or simply lack economic substance. GAARs also serve to prevent taxpayers from elevating form over function by exploiting textual weakness in statutory language in order to dodge the intended purpose of tax laws. As such, GAARS serve an important role in today's economic arena.

The digital economy is growing rapidly and will only continue to do so; however, taxing revenue from the digital economy is exceedingly difficult under current laws that remain tethered to physical presence requirements. Although there is some global agreement that archaic tax laws need to evolve to better capture revenue derived from the digital economy, no universal consensus on how best to do so exists. To support this article's argument that GAARS can serve as future-proofing measures to safeguard the underlying norms and policy goals of established tax systems amidst an evolving digital economy, this article proceeds as follows; Part I examines

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[27] *See Base erosion and profit shifting (BEPS)*, OECD, https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html (last visited Oct. 30, 2024).
[28] Avi-Yonah, et al., *supra* note 10, at 289 (Proposed in 2019, BEPS 2.0 follows the OECD/G20's failed 2013 effort to gain global consensus of its proposed BEPS 1.0).
[29] *Id*. at 297.
[30] Adam H. Rosenzweig, *BEPS: Endgame*, 54 U. MEMPHIS L. REV. 83, 129 (2023).
[31] *The OECD and Digital Services Taxes*, BLOOMBERG TAX (May 14, 2024), https://pro.bloombergtax.com/insights/international-tax/understanding-digital-services-taxes-the-oecd/.
[32] *See* Cristina Enache, *Digital Taxation around the World*, TAX FOUND. (Apr. 30, 2024), https://taxfoundation.org/research/all/global/digital-taxation/.
[33] *See* Young Ran (Christine) Kim & Darien Shanske, *State Digital Services Taxes: A Good and Permissible Idea (Despine What You Might Have Heard)*, 98 NOTRE DAME L. REV. 741, 747-49 (2022).
[34] *Tax Challenges Arising from Digitalisation – Economic Impact Assessment, OECD/G20 Base Erosion and Profit Shifting Project*, OECD, at 23 (2020), https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/10/tax-challenges-arising-from-digitalisation-economic-impact-assessment_814ce768/0e3cc2d4-en.pdf.
[35] *See* Rifat Azam, *Minimum Global Effective Corporate Tax Rate As General Anti-Avoidance Rule*, 8 COLUM. J. TAX L. 5, 35 (2017).

the vast and growing value of the digital economy, addresses the challenges of taxing the digital economy under a historic brick and mortar tax system, and explores how MNCs exercise tax avoidance in the modern digital arena. Part II explores the potential of two important initiatives: the global BEPS prevention initiative and the growing movement toward enacting unilateral DSTs. While both developments have significant promise, political and legal obstacles stand in the way of them reaching their full potential. Part III argues that the introduction of robust and well-enforced GAARs can significantly alleviate the problem of tax avoidance in the digital economy. This Part first articulates the essential characteristics of GAARs and presents their advantages and disadvantages as a tax capturing mechanism. This Part then explores how GAARs can not only work in common law countries, but also function in civil law countries that do not rely as heavily on reviewing courts to generate guiding and clarifying precedent to interpret statutes. This Part then presents five key attributes for building a GAAR that is sufficiently robust to function effectively in a digital economy. After highlighting New Zealand's GAAR as a model of statutory development and application, this Part presents a number of intriguing incentives and disincentives that can operate in parallel with a GAAR to further deter aggressive tax avoidant behavior. Finally, this article concludes that, while GAARs are not a panacea for tax avoidance problems, they can significantly enhance the ability of governments to collect legitimate cases in a new and increasingly dynamic digital environment.

I. The Promise and Peril of Digital Taxation

In recent decades, rapid growth of the digital economy has led to important policy discussions about how—or whether—to tax revenue deriving from it.[36] The digital economy is inherently different from its brick-and-mortar predecessors, leaving jurisdictions around the global with little leverage to tax data-driven earnings under current global tax laws.[37] Supporters of tax reform in the modern digital era urge that MNCs unfairly profit from revenues derived from online sources that are not tied to brick-and-mortar operations.[38]Proponents argue that tax reform could result in higher consumer costs,[39] that the internal costs of data taxes would ultimately be borne by consumers,[40] and that a tax on data could result in the demise of the "free" Internet.[41] In addition, without a unified global "playbook" by which to tax data,[42] MNCs could face a myriad

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[36] Enache, *supra* note 32.
[37] *See e.g.*, CHRISTIAN OLIVER LUCAS-MAS & RAUL FELIX JUNQUERA-VARELA, TAX THEORY APPLIED TO THE DIGITAL ECONOMY, A PROPOSAL FOR A DIGITAL DATA TAX AND A GLOBAL INTERNET TAX AGENCY, WORLD BANK GROUP (2021), at ix (on file with author) ("Increased international digital trade has put in check established tax rules, and they need to be updated."), and Omri Marian, *Taxing Data*, BYU LAW REV. 511 (2022) (offering a novel approach to taxing data collection and transmission that extends beyond the current "stagnant" tax models that are wholly reliant upon the monetary value of income).
[38] Edison Jakurti, *Taxing the digital economy, It's complicated*, BROOKINGS (Dec. 13, 2017), https://www.brookings.edu/articles/taxing-the-digital-economy-its-complicated/.
[39] *Id.*
[40] Ruth Mason & Leopoldo Parada, *International Spotlight: The Legality of Digital Taxes in Europe*, 40 VA. TAX REV. 175, 178 (2020).
[41] *See* Stacy-Ann Elvy, *Paying for Privacy and the Personal Data Economy*, 117 COLUM. L. REV. 1369, 1439 (2017).
[42] *See* Rebecca Christie, *Taxing Tech*, INT'L MONETARY FUND (Spring 2021), https://www.imf.org/external/pubs/ft/fandd/2021/03/taxing-big-tech-and-the-future-of-digital-services-tax-christie.htm; *see also The OECD and Digital Services Taxes*, *supra* note 31 ("Multinational companies can face

of uncoordinated tax laws leading to double taxation and unfair tax policies.[43] In the United States, alone, concerns have been raised that data taxes violate both the Permanent Internet Tax Freedom Act (ITFA), and the U.S. Constitution.[44]

No matter the voice, one sentiment appears universal: taxing the digital economy is complicated.[45] Scholars note that taxpayers dominating the digital space take great strides to "circumvent establishing a physical establishment in order to avoid taxes."[46] Jurisdictions wanting to tax income deriving from the digital marketplace require a regulatory system that extends beyond the purview of historic income tax models targeting brick-and-mortar operations; a need that has yet to come to fruition. To appreciate the promise and peril of digital taxation, Subpart A explores the evolution of the digital economy; subpart B discusses the challenges of taxing the digital economy under historic brick-and-mortar tax systems; and Subpart C considers MNCs' efforts to avoid taxation.

A. The Vast and Growing Digital Economy

double taxation if one government imposes DSTs (digital services taxes) on a company's revenue and then another government imposes DSTs on the same revenue").

[43] *See* Sarah Beaudoin, Note, *Death & Taxes, Or Lack Thereof: Conflicting Views Of Multinational Corporate Digital Tax Between The United States and European Union*, 43 SUFFOLK TRANSNAT'L L. REV. 129, 162 n.76 (2020) (identifying that the European Union's digital tax unfairly targets American companies); *see also* Connor L. Smith, *Reflection from the Brink Of Tax Warfare: Developing Countries, Digital Services Taxes, And An Opportunity For More Just Global Governance With the OECD's Two-Pillar Solution*, 63 B.C. L. REV. 1797, 1819 (2022) (noting that digital services taxes (DSTs) "may conflict with a longstanding international consensus against double taxation").

[44] *See* Roxanne Bland, *Taxing Digital Advertising: Its Time Has Not Yet Come*, FORBES (May 1, 2020), https://www.forbes.com/sites/taxnotes/2020/05/01/taxing-digital-advertising-its-time-has-not-yet-come/; and Joyce Beebe, *The Recent Debate Over Digital Advertising Taxes*, BAKER INST. FOR PUB. POL'Y (Nov. 15, 2021), https://www.bakerinstitute.org/research/debate-over-digital-ad-taxes (both sources specifically focusing on digital advertising taxes in the U.S.).

[45] *See e.g.*, Bruno Fajersztajn & Ramon Tomazela Santos, *The challenges of taxing the digital economy*, INT'L TAX REV. (Mar. 30, 2020), https://www.internationaltaxreview.com/article/2a6a5f25maowmchujgj5s/the-challenges-of-taxing-the-digital-economy ("It is a truism to say that the digital economy has imposed new challenges on tax policymakers."); Lauren Shores Pelikan, *State Constitutional Limitations to Cities Taxing the Digital Economy*, 43 VA. TAX REV. 469, 480-81 (2024) (identifying the challenges to taxing digital goods and services); Yariv Brauner, *Serentiy Now! The (Not So) Inclusive Framework And the Multilateral Instrument*, 25 FLA. TAX REV. 489, 515 (2022) ("[T]he recent developments in the context of taxation of the digital economy have led to the OECD effectively supporting formulary taxation of difficult to tax (under the current rules) activities."); and Kim, *supra* note 21, at 132 ("As Google, Amazon, Facebook, YouTube, and other highly digitalized businesses become mainstream in the twenty-first century economy, they pose new global tax challenges.").

[46] Robert C. Goodwill Jr. & Dr. Janie Whiteaker-Poe, *International Taxation 101: The Revenue Proposals That Will Keep The Status Quo And a Formulary Approach That Won't*, 18 HOUS. BUS. & TAX L.J. 150, 160 (2018).

With the advent of search engine technology, business efficiencies improved,[47] communications advanced,[48] conveniences expanded,[49] and competition across the social order intensified.[50] Google was particularly adept at revolutionizing information interaction, building algorithms that seamlessly link humans, computers, and networks.[51] Today, Google processes over 40,000 search queries per second, a dramatic increase from the 10,000 daily searches it fielded when first launched in 1998.[52]

Another vital component of the modern technological era was the procurement of mass data, prompting today's period reference as the "Age of Big Data."[53] Every day, 2.5 quintillion bytes of data are created,[54] transforming this digital resource into what some call the "new oil."[55] Businesses extrapolate and analyze accrued information to improve decision making and customer relations.[56] Data originates from a variety of sources, including forms filed, searches conducted, emails sent, purchases made, and mobile device applications.[57] Data also originates from genetic health testing,[58] medical billing,[59] pharmaceutical prescriptions,[60] wearable devices,[61] and even home exercise machines.[62] While there does not exist a standard metric by

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[47] Kathryn Kisska-Schulze & Karie Davis-Nozemack, *Humans vs. Robots: Rethinking Tax Policy for a More Sustainable Future*, 79 MD. L. REV. 1016 (2020).
[48] *Id*. at 1016-17.
[49] Ido Kilovaty, *Freedom to Hack*, 80 OHIO ST. L.J. 455, 458 (2019) (noting that the Internet of Things introduced conveniences).
[50] Charles E. McLure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269, 289 (1997) (offering that the digital revolution prompted changes never previously known in prior revolutions).
[51] Lily Rothman, *20 Years of Google Has Changed the Way We Think. Here's How, According to a Historian of Information*, TIME (Sept. 4, 2018); *see also* Walter Isaacson, *The Great Connectors*, VANITY FAIR (Oct. 2014), https://www.vanityfair.com/news/business/2014/10/digital-revolution-important-moments.
[52] *See Google Search Statistics*, INTERNET LIVE STATS, https://www.internetlivestats.com/google-search-statistics/ (last visited May 23, 2024).
[53] *See The Big Data Revolution*, IEDP (Feb. 27, 2012), https://www.iedp.com/articles/the-big-data-revolution/; *see also* Paul W. Grimm, Maura R. Grossman, & Gordon V. Cormack, *Artificial Intelligence As Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 30 (2021) (defining "big data" as "the algorithms and techniques used to harness a massive glut of raw data, as opposed to the carefully curated information stored in a structured database.").
[54] Bernard Marr, *How Much Data Every Day? The Mind Blowing States Everyone Should Read*, FORBES (May 21, 2018), https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=5d0d319c60ba.
[55] *See* Kiran Bhageshpur, *Data Is The New Oil – And That's A Good Thing*, FORBES (Nov. 15, 2019), https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=35aaedcc7304. *See also* Sarah Spiekermann & Jana Korunovska, *Towards a Value Theory for Personal Data*, 32 J. INFO. TECH. 62, 62 (2017) ("Personal data is the new oil of the Internet and the new currency of the digital world.") (quoting Meglena Kuneva, Europe's former consumer commissioner).
[56] *See* Andrei Hagiu & Julian Wright, *When Data Creates Competitive Advantage*, HARV. BUS. REV. (Jan.-Feb. 2020), https://hbr.org/2020/01/when-data-creates-competitive-advantage.
[57] Kimberly A. Houser & Anjanette H. Raymond, *It Is Time to Move Beyond The 'AI Race' Narrative: Why Investment And International Cooperation Must Win The Day*, 18 NW. J. TECH. & INTELL. PROP. 129, 134 & n.20 (2021).
[58] Craig Konnoth, *Health Data Federalism*, 101 B.U. L. REV. 216, 2183 & n.70 (2021).
[59] *Id*.
[60] Jennifer S. Bard, *How Public Health Informed Lawmaking Would Address the Rising Synthetic Opioid Death Toll*, 87 BROOKLYN L. REV. 657, 671 (2022).
[61] Katherine E. Vinez, *The Admissibility of Data Collected from Wearable Devices*, 4 STETSON J. ADVOC. & L. 1, 2 (2017).
[62] Zahra Takhshid, *Regulating Social Media in the Global South*, 24 VAND. J. ENT. & TECH L.J. 1, 13 n.76 (2021).

which to value personal data captured online, various approaches—like market-based models that value data based on income, cost, and/ or stock value—indicate that personal data does have monetary value.[63] The value of personal data may be relatively de minimis when considered individually, with a company willing to pay around $0.0021 for information relating to a single person's Internet search for a new car.[64] However, when personal data is aggregated, it becomes far more valuable.[65] For example, an entire year's worth of one person's data input into an app or social media network like Facebook (now Meta) might sell for over $240 on the data brokerage market.[66] Multiply that by 10,000 people, and the price just increased to $2.4 million. As Equal Employment Opportunity Commission (EEOC) Chief Analyst Kelly Trindel notes, "[e]verything we do and say can be coded, quantified and utilized for analytic purposes".[67] It is therefore unsurprising that businesses seek to acquire personal data for their own competitive advantage.[68]

In 2021, the global digital economy was valued at $14.5 trillion, representing 15.5 percent of the gross domestic product (GDP).[69] By 2025, that value is expected to increase to $20.8 trillion.[70] The United States boasts the largest digital economy at $771 billion, followed by China ($317 billion) and Japan ($164 billion).[71] This single economic arena has grown so rapidly that it is "becoming the economy itself."[72] Estimates suggest that 70 percent of new value generated over the next decade will derive from digital platforms.[73]

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63 *See* Mike Fleckenstein, Ali Obaidi, and Nektaria Tryfona, *A Review of Data Valuation Approaches and Building and Scoring a Data Valuation Model*, HARV. DATA SCI. REV., 5(1) (2023) (identifying three main ways that data is currently valued, including a market-based mode (which values data based on the routine purchase and sale of data between organizations), economic model (which values data based on economic impact), and dimensional model (which values data by assessing inherent attributes in data sets (like volume, variety and quality), and the context in which the data is being used (such as how it will be integrated with other data)). *See also* Spiekermann & Korunovska, *supra* note 55, at 62 ("Analysts, investors and entrepreneurs have recognized the value of personal data for Internet economics.").

64 *See* Luke Stein, *What Your Data is Actually Worth*, DATAPODS (Oct. 10, 2023), https://www.datapods.app/blogs/what-your-data-is-actually-worth.

65 Alida F. Babcock, Note, *Laws and Taxes and Big Tech, Oh My! The Case for A Federal Excise Tax on Targeted Digital Advertisements Created By Use Of Personal Identifiable Data*, 99 WASH. U. L. REV. 271, 287 (2021).

66 *Id*.

67 *Written Testimony of Kelly Trindel, PhD, Chief Analyst Office of Research, Information and P*lanning, EEOC, https://www.eeoc.gov/meetings/meeting-october-13-2016-big-data-workplace-examining-implications-equal-employment/trindel%2C%20phd (Oct. 13, 2016).

68 *See* Anne L. Washington & Lauren Rhue, *Tracing the Invisible: Information Fiduciaries And The Pandemic*, 70 AM. U.L. REV. 1765, 1789 (2021).

69 *See* Zia Hayat, *Digital trust: How to unleash the trillion-dollar opportunity for our global economy*, WORLD ECON. FORUM (Aug. 17, 2022), https://www.weforum.org/agenda/2022/08/digital-trust-how-to-unleash-the-trillion-dollar-opportunity-for-our-global-economy/.

70 *Id*.

71 *UK Has 4th Largest Digital Economy in the World*, CONSULTANCY.UK (Nov. 29. 2021), https://www.consultancy.uk/news/29700/uk-has-4th-largest-digital-economy-in-the-world.

72 Assaf Harpaz, *Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First Century Economy*, 46 YALE J. INT'L L. 57, 59 (2021) (citing to *Addressing the Tax Challenges of the Digital Economy*, OECD, Action 1: 2015 Final Report 54 (2015)).

73 *The Digital Economy*, WORLD ECON. F., https://intelligence.weforum.org/topics/a1Gb0000001SH21EAG (last visited Nov. 13, 2024).

The digital revolution also transformed the global advertising market. In 2023, United States digital advertising revenue increased by more than 7 percent from the prior year, to a record high of $225 billion.[74] That same year, social media platforms Facebook, Instagram, and TikTok had combined United States advertising revenues of more than $67 billion.[75] These revenues derive from companies' use of personal data that is either collected directly, or instead purchased from companies having the bandwidth to collect.[76] The greatest concentration of big data power—and thus revenue—lies with MNCs that enjoy a market value of $5.2 trillion, of which $1.6 trillion derives from United States sources.[77] In fact, between 2016 and 2021, the greater tech industry not only produced the largest increase in total shareholder return, but likewise exhibited the greatest surge in market value.[78] This industry is expected to mature at a compound annual growth rate of 4.3 percent by 2026.[79]

Given the financial success of MNCs in the modern digital arena, policymakers now seek to tax them.[80] However, as the next Subpart explains, challenges exist to taxing data.[81] Such difficulties stem from absence of physical presence, global dependence on hyperconnectivity, complexities in digital economy transactions, and obscurities in qualifying digital assets, activities and types of income.[82]

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[74] *Online Advertising Revenue in the United States From 2000 to 2023*, STATISTA, https://www.statista.com/statistics/183816/us-online-advertising-revenue-since-2000/ (last visited Nov. 13, 2024); *see also 2023 U.S. Digital Advertising Industry Hits New Record, According to IAB's Annual Internet Advertising Revenue Report*, PR NEWSWIRE (Apr. 16, 2024), https://www.prnewswire.com/news-releases/2023-us-digital-advertising-industry-hits-new-record-according-to-iabs-annual-internet-advertising-revenue-report-302117293.html.

[75] *Leading Social Media Platforms in the United States in 2023, by Ad Revenue*, STATISTA, https://www.statista.com/statistics/1103339/social-media-ad-revenue-platform/ (last visited Nov. 13, 2024). (2023 Facebook ad revenue in the United States was $36.6 billion; Instagram was $21.3 billion, and TikTok was $10.1 billion).

[76] Marian, *supra* note 37, at 543 (noting that data is valuable to the collectors); *see also* Noam Kolt, *Return on Data: Personalizing Consumer Guidance in Data Exchanges*, 38 YALE L. & POL'Y REV. 77, 121 (2019) (providing that consumers sell their personal data to others for cash), and Candice L. Kline, Comment: *Security Theater And Database-Driven Information Markets: A Case For An Omnibus U.S. Data Privacy Statute*, 39 U. TOL. L. REV. 443, 447 (2008) (providing that data brokerage companies sell individuals' personal data to companies and the public sector).

[77] Jack Flynn, *Tech Industry Statistics [2022]: The State of The U.S. Tech Industry*, ZIPPIA (Feb. 1, 2022), https://www.zippia.com/advice/tech-industry-statistics/.

[78] Derek Kennedy et al., *Tech Comes Out on Top. Can It Stay There?*, BCG (Mar. 10, 2022), https://www.bcg.com/publications/2022/tech-companies-come-out-on-top-but-can-they-stay-there (Finding an annual average TSR of 30% for the 113 tech companies examined, and market value growth of $15 trillion during the study period).

[79] *The Global Information Technology Market Was Valued at US$5.2 Trillion by 2020, and is Expected to Grow at a CAGR of 4.3% by 2026*, GLOBENEWSWIRE (Jan 7, 2022), https://www.globenewswire.com/news-release/2022/01/07/2363256/0/en/The-global-information-technology-market-was-valued-at-US-5-2-trillion-by-2020-and-it-is-expected-to-grow-at-a-CAGR-of-4-3-by-2026.html.

[80] Christie, *supra* note 42.

[81] *See e.g*., Appleby, *supra* note 9, at 5 (noting that the digital services tax in particular "has proved challenging and produced inconsistent regimes across countries"); Marian, *supra* note 37, at 548 (offering that the digital economy is "challenging traditional tax models"); Adam B. Thimmesch, *Transacting in Data: Tax, Privacy, and the New Economy*, 94 DENV. L. REV. 148 (2016) ("The unique aspects of the personal-data economy… raise critical questions regarding the design of our tax systems for the future.").

[82] Fajersztajn & Tomazela, *supra* note 45.

B. Challenges to Taxing the Digital Economy

International tax policies generally require that corporations pay taxes on their earnings based on where they are incorporated, physically located, or where their income sources derive from.[83] In a purely brick-and-mortar environment, this is relatively straightforward. For example, if Cumbl Cookies opens a store in Beaufort, South Carolina, South Carolina can tax the income attributable to that store because it is physically located in and doing business in the state. If German-based grocer Aldi opens a store in Portland, Oregon, Oregon can tax earnings from that store because it is physically located in and doing business within its borders. Automaker Tesla has 236 dealerships located across 37 states and territories,[84] and 78 stores located in 8 foreign countries,[85] thus potentially subjecting it to taxation in each jurisdiction where it is physically located and doing business. However, jurisdictions across the globe are grappling with how to tax income stemming from the digital economy, where brick and mortar/ physical presence standards cease to exist.[86]

In 1996, the *Tax Law Review* published an article examining the future of taxation amidst a growing arena of global electronic commerce, finding that "[T]his new fact of electronic commerce creates a new need of tax analysis".[87] More than 20 years later, scholars began filling that lacuna in legal scholarship by critically analyzing the intersection between the personal-data economy, and taxation.[88] Scholars now recognize that personal-data barter transactions—where businesses provide access to online resources (like email and social media platforms) in exchange for consumers' personal data[89]—constitute taxable transactions, even without actual currency exchange.[90] However, scholars have likewise identified select impediments to the realities of taxing data.

[83] Marian, *supra* note 37, at 532.
[84] *See How many Tesla dealers are there in the United States*, SCRAPEHERO, https://www.scrapehero.com/location-reports/Tesla-USA/ (last visited Sept. 27, 2023).
[85] *See* Pierce Keesee, *How Many Tesla Stores are there Around the World?*, OPTIWATT (Aug. 12, 2022), https://optiwatt.com/blog/how-many-tesla-stores-are-there-around-the-world.
[86] *See* Brett Dembrow, Comment: *Investing in Human Futures: How Big Tech and Social Media Giants Abuse Privacy and Manipulate Consumerism*, 30 U. MIAMI BUS. L. REV. 324, 325 (2022) (noting that large companies collect user data, bundle that data with other similar users, and then sell the bundled consumer information to third parties).
[87] Charles I. Kingson, *Taxing the Future*, 51 TAX L. REV. 641, 649 (1996) (citing to U.S. Treas. Dep't, Selected Tax Policy Implications of Global Electronic Commerce (Discussion Draft, Nov. 21, 1996), *reprinted in* 96 TNT 228-19, Nov. 22, 1996)).
[88] Thimmesch, *supra* note 81, at 148.
[89] *See e.g.*, Hillel Nadler, *Taxing Zero*, 26 FLA. TAX REV. 235, 257 (2023) ("Most zero-price transactions involve a kind of barter transaction: a business provides some good or service to its customers in exchange for something of value (other than cash) from the customers. In the case of digital services, tech companies provide a service whether it is online search, email or access to a social network in exchange for access to their users' data or attention."), and Mark J. Cowan, Joshua Cutler, & Ryan J. Baxter, *Strategic Surrogates or Sad Sinners: U.S. Taxation of Bartering in Digital Services*, 58 AM. BUS. L.J. 849, 870 (2021) ("barter transactions are taxable even though no cash changes hands.").
[90] Thimmesch, *supra* note 81, at 162-63 (citing to I.R.C. §§ 61(a) and 83(a), (b); Treas. Reg. § 1.61-2(d)(1) (as amended in 2003); Rev. Rul. 79-24, 1979-1 C.B. 60; and Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429-31 (1955)).

First, one of the greatest barriers to taxing data lies in how to effectively value personal data.[91] To report income for tax purposes, it must be determinable, meaning there exists some basis for determining the amount of income that is, in fact, taxable.[92] However, when trying to apply this rule to the digital economy, things get complicated because there is no cash market for personal data barter transactions. Thus, applying fair market value standards (like paying the local going rate of $100 in exchange for your lawn being mowed) is not so easy.[93] In addition, personal-data transactions are ongoing—rather than static—thus making it difficult for economists to value consumers' periodic access and use of digital services.[94] This is because differing values and needs drive individuals to access and use digital services (for example, using digital services for business or work, versus education, pleasure, or sheer boredom), thus making it difficult to assess how to translate differing value-driven usages into cash on an open market.[95] Third, individual data is generally worthless until aggregated with others' individual data, thus making the valuation of isolated data nearly impossible.[96] Finally, valuing data is difficult because data can be replicated over and over, without loss to the original data source.[97] For example, an individual can sell their date of their birth over and over again, to whoever is willing to buy it, and at whatever price a third party is willing to pay for it, making it virtually impossible to attach a singular value to that same piece of personal data.[98]

A second impediment to taxing data arises from the fact that it can be difficult to differentiate a taxable personal-data transaction from a non-taxable one. Under this theory, if two neighbors share tips on how best to mow their lawn while chatting in their front yards, and those same neighbors then share those same tips on a social media platform (like Facebook), how does one determine which of these two personal-data transactions rises to the level of a taxable event?[99] Should the front-yard neighborly transaction be deemed nontaxable, but sharing lawn mowing advise on Facebook be taxable merely because the benefit received in the second example is web

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[91] Thimmesch, *supra* note 81, at 174; *see also* Nadler, *supra* note 89, at 274 ("As a matter of doctrinal tax law, it is clear that the amount received in a barter transaction, such as a zero-price transaction, should be included in income. What is less clear is how that amount should be valued.").

[92] *See* Orly Mazur, *Taxing the Cloud*, 103 CALIF. L. REV. 1, 14-15 (2015) ("[T]he United States generally only taxes nonresidents on income that they generate within U.S. borders. As such, a foreign cloud vendor… will be subject to U.S. federal income taxation on income that is (1) effectively connected with a U.S. trade or business if no treaty exists between the United States and the cloud vendor's jurisdiction, (2) attributable to a permanent establishment if a treaty applies, or (3) fixed, determinable, annual, and periodical (FDAP) and arises within the United States."); *see also Fixed, determinable, annual or periodical (FDAP) income*, IRS, https://www.irs.gov/individuals/international-taxpayers/fixed-determinable-annual-or-periodical-fdap-income (last visited Oct. 7, 2024) (noting, "Income is determinable whenever there is a basis for figuring the amount to be paid.").

[93] Nadler *supra* note 89, at 275 (noting that applying standard fair market value standards to a no cash, zero-price transaction involving web searches or social media is difficult).

[94] Thimmesch, *supra* note 81, at 175.

[95] *Id.* at 175-76.

[96] Paul Jurcys, Chris Donewald, Jure Globocnik, & Markus Lampinen, *My Data, My Terms: A Proposal For Personal Data Use Licenses*, HARV. J.L. & TECH. DIG., at 10 (2020) (noting that technology companies derive "the greatest value from aggregated customer personal data"), and Steven H. Hazel, *Personal Data As Property*, 70 SYRACUSE L. REV. 1055, 1063 (2020) ("personal information usually has economic value only when combined.").

[97] Thimmesch, *supra* note 81, at 176.

[98] *See* Kolt, *supra* note 76, at 90 ("The value of data, like that of many other resources, is not predetermined or fixed, but a function of supply and demand.").

[99] *See* Thimmesch, *supra* note 81, at 177.

access, versus mere neighborly pleasantry in the first example?[100] Even if a legal line could be drawn so that only those transactions that (1) involve digital data transfers, and (2) are commercialized, rise to the level of taxable events, could one then argue that a neighbor posting a commercial lawn care company recommendation on their Facebook page is a taxable event?[101] Could one similarly argue that two neighbors emailing each other about which local lawn care company to use rises to the level of a taxable event? Alas, while not impossible to draw data tax lines, it could prove extremely sticky.[102]

A third impediment to taxing data is the fact that the Internet is largely anonymous, so it may be virtually impossible to tax users' personal-data gains given the extent to which false data is input into the Internet,[103] and the magnitude of shared devices and/ or platforms used (thus making it impossible to know which transactions tie to which taxpayers).[104]

Finally, American people simply do not tolerate new taxes; particularly taxes tied to Internet use as evidenced by the passage of the Permanent ITFA which prohibits taxation of Internet access.[105] Such distain would likely prompt increased political action across the United States to further protect the American public from taxes deriving from Internet and/ or social media use.

Regardless of the above challenges, scholars have also identified select realities when examining the *whys* of taxing data. First, data has become ubiquitous in modern society, and there is no going backwards.[106] Second, companies are increasingly capturing and monetizing private information to appease data-driven market demands.[107] Third, digitization has resulted in a rapid shift away from the historic brick-and-mortar income-based economy, toward a more modern data-driven economy.[108] Finally, global tax regimes are ill-equipped to account for either the massive values generated from private consumer data,[109] or the fact that such revenues are being generated without companies having any physical presence.[110] Still, even if jurisdictions *could* resolve these various tax conundrums, as the next subpart details, imposing any form of tax on the digital arena would likely invite increased corporate tax avoidance.[111]

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[100] *Id.*
[101] *Id*.
[102] *Id.* at 178.
[103] *See* Mindi Chahal, *Consumers are 'dirtying' databases with false details*, MARKETINGWEEK (July 8, 2015); *see also* Niva Elkin-Koren & Michal S. Gal, *The Chilling Effect of Governance-by-Data on Data Markets*, 86 U. CHI. L. REV. 403, 431 (2019) (noting the need to create disincentives to minimize fake personal data input online)
[104] Thimmesch, *supra* note 81, at 180.
[105] *Id*. at 181. For more information on the Internet Tax Freedom Act, and the historic plausibility of taxing emails, *see* Kathryn Kisska-Schulze, *The Future of E-mail Taxation in the Wake of the Expiration of the Internet Tax Freedom Act*, 51 AM. BUS. L. J. 2, 315-56 (2014).
[106] Thimmesch, *supra* note 8181, at 149.
[107] *See* Elvy, *supra* note 41, at 1373.
[108] *See* Marian, *supra* note 37, at 513-517.
[109] *See* Appleby, *supra* note 9, at 3.
[110] Avi-Yonah et al., *supra* not 10, at 280.
[111] *See* Daniel Wells, *Shareholder Inequity in The Age of Big Tech: Public Policy Dangers of Dual-Class Share Structures And The Case For Congressional Action*, 13 NE. U. L. REV. 41, 51 (2021).

C. The Effects of Profit Shifting on the Global Economy

Scholars generally recognize taxation as an essential and vital social mechanism,[112] to be undertaken as a "collective obligation of citizenship."[113] Without tax revenue, governments could not function.[114] Modern public services like healthcare, transportation infrastructure, education, and national defense would end.[115] Government-financed communication and research infrastructures within the health, education, technology, environmental, and space sectors would cease.[116] Effectively, taxes are a public necessity.[117]

In the United States, individual income taxes are the primary source of governmental revenue, accounting for almost half of all tax revenues collected.[118] Social insurance taxes, like Social Security and Medicare, come in second at 21.9 percent.[119] Consumption (including sales) taxes account for 15.7 percent of tax revenues collected, while property taxes make up just over 10 percent.[120] At the bottom of the ladder, corporate income tax revenues account for just 6.5 percent of total tax revenue collected in the U.S..[121]

Similarly, corporate income taxes account for just 11.8 percent of all tax revenues collected among the 38 member countries of the OECD, while individual, social insurance, and consumption taxes accounted for 80.4 percent of revenues collected.[122] The relatively low percentage of corporate tax revenues collected both in the U.S. and abroad is intriguing, given that in 2023, 500 of the world's largest corporations enjoyed aggregate record-breaking revenues of $41 trillion,[123] while the average global personal income was just $9,733.[124]

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[112] *See* Robert Bird & Karie Davis-Nozemack, *Tax Avoidance as a Sustainability Problem*, 151 J. BUS. ETHICS 1009, 1010 (2018) (noting that taxation is essential for governmental function). *See also* ALEX HILLING & DANIEL T. OSTAS, CORPORATE TAXATION AND SOCIAL RESPONSIBILITY 40 (2015) (viewing taxation as a "vital mechanism" in society).
[113] Jay Soled & Richard Schmalbeck, *Americans Have Civic Duty to Pay Taxes to Help Nation in Crisis*, RUTGERS (Apr. 22, 2020), https://www.business.rutgers.edu/business-insights/americans-have-civic-duty-pay-taxes-help-nation-crisis (urging that all must participate in tax paying obligations); Loren D. Prescott, Jr., *Challenging The Adversarial Approach To Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 731 n.161 (1997) (referencing taxpayer responsibility as a "collective obligation of citizenship").
[114] Avi-Yonah, *supra* note 10, at 3.
[115] *See* Bird & Davis-Nozemack, *supra* note 112, at 1010; *see also* Len M. Nichols, *Government Intervention in Health Care Markets Is Practical, Necessary, and Morally Sound*, 40 J.L. MED. & ETHICS 547, 550 (2012).
[116] *See* Bird & Davis-Nozemack, *supra* note 112, at 1010; *see also* Nichols, *id.* at 550.
[117] Brian Galle & Yair Listokin, *Monetary Finance*, 75 TAX L. REV. 137, 142 (2022).
[118] Daniel Bunn & Cecilia Perez Weigel, *Sources of US Tax Revenue by Tax Type, 2024 Update*, TAX FOUND., https://taxfoundation.org/data/all/federal/us-tax-revenue-by-tax-type-2024/ (Mar. 26, 2024),
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Fortune Global 500*, FORTUNE, https://fortune.com/ranking/global500/ (last visited Oct. 16, 2024).
[124] Jack Flynn, *Average Global Income [2023]: What Is The Median Income Worldwide?*, ZIPPIA (Apr. 13, 2023), https://www.zippia.com/advice/average-income-worldwide/.

A 2023 Pew Research study found that 56 percent of Americans harbor concerns that they pay "more than their fair share" in taxes.[125] That same study found that 61 percent of respondents think corporations do not pay their fair share in taxes, and 65 percent believe corporate tax rates are too low.[126] Also in 2023, a U.S. Government Accountability Office (GAO) study found that between 2014 and 2018, 46 to 58 percent of large corporations paid zero United States federal income taxes.[127] Of the large profitable corporations identified in the study, 34 percent had no United States tax liability.[128]

Similarly, a 2021 Institute of Taxation and Economic Policy study found that 55 of the largest United States corporations paid no federal corporate income tax on their 2020 profits, even though they collectively generated $40.5 billion in United States pretaxable income that same year.[129] Between 2018 and 2021, Amazon paid $4 billion in federal corporate income taxes on $78.6 billion United States pretax earnings, equating to an effective annual tax rate of just 5.1 percent.[130] In 2020, research conducted by ActionAid International found that Big Tech exploited global tax loopholes to avoid paying $2.8 billion a year in taxes in developing countries.[131] One year later, Facebook whistleblower Frances Haugen likened Big Tech to Big Tobacco;[132] citing corporate growth over safety,[133] purposeful misleading of the public,[134] vulnerable demographics targeting,[135] and significant profits emanating from others' habit-forming behaviors.[136]

In actuality, corporations have numerous means by which to legally minimize their taxable income (and thus associated tax obligations), including net operating losses to offset taxable

[125] Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don't Pay Fair Share*, PEW RES. CTR. (Apr. 7, 2023), https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share/.
[126] *Id*.
[127] *Corporate Income Tax Effective Rates before and after 2017 Law Change*, GAO, at 14 (Dec. 2022), https://www.gao.gov/assets/gao-23-105384.pdf (For purposes of this study, "large corporations" are those that file IRS Schedule M-3, which is required of corporations with more than $10 million in assets). *Id*. at GAO Highlights.
[128] *Id.* at 12.
[129] Matthew Gardner & Steve Wamhoff, *55 Corporations Paid $0 in Federal Taxes on 2020 Profits*, ITEP (Apr. 2, 2021), https://itep.org/55-profitable-corporations-zero-corporate-tax/.
[130] Matthew Gardner, *Amazon Avoids More Than $5 Billion in Corporate Income Taxes, Reports 6 Percent Tax Rate on $35 Billion of U.S. Income*, ITEP (Feb. 7, 2022), https://itep.org/amazon-avoids-more-than-5-billion-in-corporate-income-taxes-reports-6-percent-tax-rate-on-35-billion-of-us-income/.
[131] *$2.8bn 'Tax Gap' Exposed by ActionAid Research Reveals Tip of the Iceberg of 'Big Tech's Big Tax Bill' in the Global South*, ACTIONAID (Oct. 26, 2020), https://actionaid.org/news/2020/28bn-tax-gap-exposed-actionaid-research-reveals-tip-iceberg-big-techs-big-tax-bill-global.
[132] *See* Abby Lemert, *Facebook's Corporate Law Paradox,* 17 VA. L. & BUS. REV. 43, 47 (2022).
[133] *Id.* at 46.
[134] *See* John Eggerton, *Haugen Hearing: Sen. Blumenthal Calls It Facebook's Big Tobacco Moment*, NEXTTV (Oct. 5, 2021), https://www.nexttv.com/news/haugen-hearing-sen-blumenthal-calls-it-facebooks-big-tobacco-moment.
[135] *See* Grayce McCormick, *Is Facebook really having its 'Big Tobacco moment'?,* CBS IOWA (Oct. 19, 2021), https://cbs2iowa.com/news/nation-world/is-facebook-really-having-its-big-tobacco-moment (noting that Facebook entertained plans to market to children under the age of 13).
[136] *See* Eric James Beyer, *Is Big Tech the New Big Tobacco?*, INTERESTING ENGINEERING (Nov. 2, 2021), https://interestingengineering.com/culture/is-big-tech-the-new-big-tobacco

income,[137] tax credits and deductions,[138] and profit shifting from high- to low- or no-tax jurisdictions.[139] However, MNCs have become particularly adept at using tax avoidance strategies to minimize or eliminate corporate tax responsibilities.[140] Such strategies include corporate inversion, which entails a company restructuring itself by creating a foreign parent corporation that replaces the domestic parent corporation in order to effectively relocate the company's tax jurisdiction overseas.[141] Another strategy is called tax arbitrage, where taxpayers take advantage of differing tax laws—like tax rates, and the tax treatment of different types of entities—across global jurisdictions to avoid being taxed on profits deriving from cross-border transactions.[142] A third way that companies might avoid taxes is through transfer pricing manipulation, which can occur when a MNC establishes a foreign subsidiary in a tax haven, and then sells goods to that subsidiary at below-market prices so the parent company can report losses in the higher tax jurisdiction, while the subsidiary can then resell the goods at fair market value and have those earnings taxed at lower rates in the tax haven where they are located.[143]

Tax avoidance proponents argue that while these and other tax avoidance strategies may be crafted in ways that technically fall within the letter of the law, tax avoidance schemes can violate the spirit of the law by exploiting tax law loopholes that serve to minimize or eliminate taxes owed.[144] Advocates of tax avoidance have long relied on the words of Justice Learned Hand, who proffered, "[a]ny one may so arrange his affairs that his taxes shall be as low as

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[137] Michelle M. Arnopol, *Why Have Chapter 11 Bankruptcies Failed So Miserably? A Reappraisal of Congressional Attempts to Protect a Corporation's Net Operating Losses After Bankruptcy*, 68 NOTRE DAME L. REV. 133, 139 (1992) (noting the valuable role of Net Operating Losses); *see also How to Calculate Net Operating Loss for Corporations*, BLOOMBERG TAX (Jan. 26, 2024), https://pro.bloombergtax.com/insights/federal-tax/net-operating-losses/.
[138] *See Credits and Deductions for businesses*, IRS, https://www.irs.gov/credits-deductions/businesses (last visited Oct. 15, 2024).
[139] *See Profit Shifting*, TAX FOUND., https://taxfoundation.org/taxedu/glossary/profit-shifting/ (last visited Oct. 15, 2024).
[140] Kayal Munisami, *The Role of Corporate Social Responsibility In Solving The Great Corporate Tax Dodge*, 17 FLA. ST. U. BUS. REV. 55, 67 (2017-18) (discussing a list of ways in which companies avoid taxes).
[141] *See* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. 1, 11 (2019).
[142] Marian, *supra* note 37, at 533.
[143] Sandra Marco Colino, *The Long Arm of State Aid Law: Crushing Corporate Tax Avoidance*, 44 FORDHAM INT'L L.J. 397, 428 (2020) (noting that in MNCs engaged in profit allocation manipulation through transfer pricing costs the U.S. billions of dollars); *see also* Beaudoin, *supra* note 43, at 142, n. 29 (noting, "transfer pricing is overtly abused" by MNEs).
[144] *See* James Alm, Joyce Beebe, Michael S. Kirsch, Omri Marian, & Jay Soled, *New Technologies And The Evolution Of Tax Compliance*, 39 VA. TAX REV. 287, 335 (2020). *See also* Diane Ring & Constantino Grasso, *Tax Evasion, Corruption And The Distortion Of Justice: Beyond Bribery: Exploring The Intimate Interconnections Between Corruption And Tax Crimes*, 85 LAW & CONTEMP. PROB. 1, 5 (2022) (opining that tax avoidance as an "unethical and unscrupulous use of legal loopholes to minimize tax liability" violates the spirit of the law); Elaine Doyle, *Tax Evasion, Corruption and The Distortion of Justice: Encouraging Ethical Tax Compliance Behavior: The Role of The Tax Practitioner in Enhancing Tax Justice*, 85 L. & CONTEMP. PROB. 137, 153 (2022) (connecting aggressive tax avoidance strategies to tax practitioners' violation of the spirit of tax legislation); Jacob Fonseca, *The Rise of ESG Investing: How Aggressive Tax Avoidance Affects Corporate Governance & ESG Analysis*, 25 ILL. BUS. L.J. 1, 8 (2020) ("[T]ax avoidance is generally considered to be a legal practice that is viewed negatively by the public and may be considered illegal by those who find it to be a particularly egregious misuse of tax law."); Eric C. Chaffee & Karie Davis-Nozemack, *Corporate Tax Avoidance And Honoring The Fiduciary Duties Owed To The Corporation And Its Stockholders*, 58 B.C. L. REV. 1425, 1433 (2017) (providing that tax avoidance results in significant public scorn); and Bird & Davis-Nozemack, *supra* note 112, at 1010 (evidencing strong public condemnation of tax avoidance practices).

possible."[145] They argue that tax professionals help taxpayers minimize their tax burdens—not as bad actors, but as experts in the compliance process.[146] Some identify tax avoidance as moral,[147] while others suggest it is respectable,[148] contending that a company's failure to pursue tax avoidance strategies amount to a breach in their fiduciary duties to shareholders.[149]

While outside the scope of this article to further delve into these contrasting arguments, the reality is that MNCs earn significant profits from the digital economy, but pay little in taxes because current tax laws make it difficult for taxing jurisdictions to capture profits deriving from the digital economy. The challenges of taxing the digital economy, combined with the challenges of ongoing corporate tax avoidance, frustrate jurisdictions. At present, no global framework exists to tax, or mitigate tax avoidance in, the modern digital economy.[150] This regulatory lacuna is not entirely surprising given the difficulties in taxing data,[151] as well as the reality that not everyone agrees that imposing a tax on data is prudent.[152] However, the OECD estimates that global revenues could increase to $100 billion annually,[153] if a universal set of regulatory policies existed that would allow countries to tax activities within their borders regardless of physical presence.[154] As the next Part details, there is increasing interest, globally, to implement a viable regulatory tax system that extends become the purview of brick-and-mortar income tax models.

II. Beyond Current Income Tax Models: BEPS and DSTs

Two of the most prominent initiatives that could broaden the scope of corporate income tax collection in the digital economy are a globally-coordinated BEPS project, and unilaterally imposed DSTs. BEPS (base erosion and profit shifting) refers to "tax-avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations."[155]

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[145] Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).
[146] William B. Barker, *The Ideology of Tax Avoidance*, 40 LOY. U. CHI. L.J. 229, 235 (2009) (noting that tax professionals are not exerting bad behavior simply by helping taxpayers minimize their tax burdens); *see also* Doyle, *supra* note 144, at 140-41 (discussing the function of tax professionals).
[147] Steven A. Bank, *When Did Tax Avoidance Become Respectable?* 71 TAX L. REV. 123, 123 (2017).
[148] *Id*. at 124.
[149] *Id*. at 131.
[150] *See* Marian, *supra* note 37, at 551-52.
[151] *See id.* at 514 (noting the difficulties in taxing a data economy, including sourcing issues, ownership interests, and determining the monetary value of data). *See also* Thimmesch, *supra* note 81 (identifying practical obstacles to taxing data, including valuation problems, identifying which transactions to tax, the impact of taxation on data providers, how to tax the anonymous Internet, and lack of political will).
[152] *S*ee Joe Kennedy, *Digital Services Taxes: A Bad Idea Whose Time Should Never Come*, INFO. TECH. & INNOVATION FOUND. (May 13, 2019), https://itif.org/publications/2019/05/13/digital-services-taxes-bad-idea-whose-time-should-never-come/; Ashely Johnson, *A Data Sales Tax Would Change the Internet for the Worse*, INFO. TECH. & INNOVATION FOUND. (June 8, 2020), https://itif.org/publications/2020/06/08/data-sales-tax-would-change-internet-worse/; and Karl A. Frieden & Douglas L. Lindhom, *State Digital Services Taxes: A Bad Idea Under Any Theory*, TAX NOTES (Apr. 10, 2023), https://www.taxnotes.com/special-reports/digital-economy/state-digital-services-taxes-bad-idea-under-any-theory/2023/04/07/7g9bc.
[153] *See* Christie, *supra* note 42 (such estimate considers both the OECD's base erosion and profit shifting recommendations – which include a shift in sourcing rules – in conjunction with the U.S. global intangible low-tax income (GILTI) regime).
[154] *Understanding Digital Services Taxes & the OECD*, BLOOMBERG TAX (Jan. 4, 2023), https://pro.bloombergtax.com/brief/understanding-digital-services-taxes-the-oecd/.
[155] *Base Erosion and Profit Shifting (BEPS): OECD/G20 Tax Proposals*, CONG. RES. SVC., at 1 (Updated Aug. 26, 2021), https://crsreports.congress.gov/product/pdf/R/R44900.

For over a decade, the OECD has been developing proposals to reduce BEPS.[156] Some of its proposals have been (or could be) implemented in various jurisdictions via administrative or legislative action.[157] The ultimate goal of the BEPS project is to employ an international framework that can help countries mitigate MNCs' tax avoidance schemes, and provide governments with a means to tax profits where the economic activities generating those profits occur, and/ or where value is actually created.[158] Effectively, the BEPS project would "create a single set of consensus-based international tax rules" that mitigate profit-shifting opportunities, and realign tax rules to address the challenges of the modern digital economy.[159]

Although the ideal behind the BEPS project is perhaps auspicious, its future is not assured. The OECD's failure to thus far secure universal agreement on how to tax non-resident companies has resulted in individual jurisdictions either proposing or implementing DSTs.[160] DSTs are generally imposed on gross revenues deriving from select digital services, like the sale of advertising space, or the sale of data collected by users of online platforms.[161] Currently, 15 out of 37 OECD countries, as well as Argentina, Brazil, Kenya, and Vietnam have either enacted, or proposed, DSTs.[162]

While both the BEPS project and DSTs present opportunities to modernize historic tax rules, neither are on the immediate cusp of introducing a new era of unified global digital taxation. Although 140 countries have signed onto the BEPS project, the United States has not; and if it inevitably does not, such absence could result in a continuation of the current fragmented global tax landscape.[163] Such fragmentation could be further exacerbated by the "growing web of unilateral DSTs" that may be difficult to untangle if or when the BEPS project comes to fruition.[164] To better understand the ongoing efforts to tax the digital economy, Subpart A discusses in more detail the BEPS project, while Subpart B examines individual jurisdictional efforts to enact DSTs.

A. The Unrealized Potential of the BEPS Project

The BEPS project is a global initiative aimed at deterring MNCs from avoiding taxation by exploiting tax law loopholes.[165] If universally adopted, the BEPS project would serve as a mechanism that ensures MNCs responsible for paying their fair share of taxes.[166] To date, the BEPS project has undergone significant transformation.

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[156] *Id*.
[157] *Id*.
[158] *Base erosion and profit shifting (BEPS), supra* note 27.
[159] *BEPS Project Explanatory Statement*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT, https://www.oecd.org/en/publications/beps-project-explanatory-statement_9789264263437-en.html (Aug. 26, 2016).
[160] Mason & Parada, *supra* note 40, at 176.
[161] *The OECD and Digital Services Taxes*, *supra* note 31.
[162] William Morris & Pat Brown, *Digital service taxes: Are they here to stay?*, PWC, https://www.pwc.com/us/en/services/tax/library/digital-service-taxes.html (last visited Oct. 18, 2024).
[163] *The OECD global tax deal still hands in the balance*, EIU (Mar. 1, 2024), https://www.eiu.com/n/the-oecd-global-tax-deal-still-hangs-in-the-balance/ (last visited Nov. 13, 2024).
[164] Morris & Brown, *supra* note 162.
[165] *See Base Erosion and Profit Shifting supra* note 27.
[166] See Doran Narotzki & Tamir Shanan, *Cross-Border Corporate Social Responsibility And Taxation: A New Conceptual Framework In An Era Of Economic Globalization*, 18 OHIO ST. BUS. L.J. 155, 1168 (2023).

The first of the OECD's efforts came in 2013 in the form of BEPS 1.0 at the request and endorsement of the G20[167] countries.[168] BEPS 1.0, included fifteen action items that addressed the challenges of taxing the digital economy, and ways to mitigate corporate tax avoidance schemes.[169] Although BEPS 1.0 was designed to ensure that MNCs would pay tax where they earn profits (rather than where profits are shifted to), it did not provide fundamental rules about *how* to tax companies that operate in the digital economy.[170] After a 3 year effort to garner global support, BEPS 1.0 failed due to the United States's opposition to any proposed global tax rules that seemed to target U.S. technology firms.[171]

In 2018, the OECD published BEPS 2.0, which provided an updated analysis of the tax challenges facing the digital economy, to include modifying fundamental rules for allocating MNC's profits among jurisdictions (something that BEPS 1.0 failed to do).[172] BEPS 2.0 consists of a two-part framework (broken down into pillars) to address these issues. Pillar One establishes rules that expand jurisdictions' taxing rights, regardless of historic physical presence standards.[173] It targets large companies with global revenues over €20 million euros, and profitability above 10 percent of revenues, thereby pursuing the world's largest MNCs, while leaving small and mid-size companies alone.[174] At present, the OECD has not received global consensus on Pillar One, particularly because jurisdictions disagree on how much tax revenue should be allocated to the home jurisdiction of a MNC, versus where the MNC actually generates its value.[175] In addition, Pillar One lacks United States support (again, because it is deemed discriminatory against large U.S. tech firms).[176] Finally, given that Pillar One would require

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[167] *See The G20*, AUSTRALIAN GOV., https://www.dfat.gov.au/trade/organisations/g20 (last visited Oct. 18, 2024).

[168] *See* Daniel Bunn, *Summary and Analysis of the OECD's Work Program for BEPS 2.0*, TAX FOUND. (June 18, 2019), https://taxfoundation.org/oecd-work-program-beps-analysis/; *see also What is BEPS & OECD BEPS Package*, CHINATAX, https://www.china-tax.net/hong-kong-and-china-tax/what-is-beps-oecd-g20-beps-package.html (last visited Nov. 13, 2024).

[169] *See Action Plan on Base Erosion and Profit Shifting*, OECD (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf.

[170] Ben Edwards, *What would it take to stop multinationals hiding profits*, RACONTEUR (June 8, 2023), https://www.raconteur.net/risk-regulation/beps-2-tax-regime.

[171] *See* Avi-Yonah et al., *supra* note 10, at 282.

[172] Bunn, *supra* note 168168. *See also What are the OECD Pillar 1 and Pillar 2 international taxation reforms*, TAX POL'Y CTR., https://taxpolicycenter.org/briefing-book/what-are-oecd-pillar-1-and-pillar-2-international-taxation-reforms (last visited Oct. 18, 2024).

[173] *See Progress Report on Amount A of Pillar ONE*, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT 8, 13-15 (2022), https://www.oecd.org/tax/beps/progress-report-on-amount-a-of-pillar-one-july-2022.pdf (explaining that Nexus amounts are set at €1 million euros in revenue from market jurisdictions, or €250,000 euros within those jurisdictions with a GDP lower than €40 billion euros). *Id.* at 13.

[174] *Id.* at 8 (explaining that in order to fall within the scope of Pillar One, companies must have global revenue that exceeds €20 billion euros, and a profit-to-revenue ration of over 10%). *Id.* at 10.

[175] *Pillar One deadline has passed: new Digital Services Taxes on the horizon?*, DENTONS (July 8, 2024), https://www.dentons.com/en/insights/alerts/2024/july/8/pillar-one-deadline-has-passed-new-digital-services-taxes-on-the-horizon.

[176] Smith, *supra* note 43, at 1798. *See also* Jane R. Gravelle, *The OECD/G20 Pillar 1 and Digital Services Taxes: A Comparison*, CONG. RES. SERV. 2 (Apr. 1, 2024).

significant treaty revisions by the United States, it is doubtful that Congress would be willing to sign on.[177]

Unlike Pillar One, Pillar Two has garnered more plausible interest, globally.[178] It establishes a 15 percent global minimum effective tax rate for MNCs with more than €750 million euros in annual revenue, thus ensuring that they pay a minimum level of tax regardless of where they actually earn it.[179] It also includes a dispute resolution processes.[180] Thus far the EU, United Kingdom (UK), Japan and South Korea have implemented Pillar Two rules; however, United States support remains stalled on this pillar as well.[181]

A growing body of scholarly literature has examined the perils and plight of the BEPS project. While some favor the OECD's adoption of a multilateral approach to tax the digital economy, it has been proposed that such model be modified to eliminate the global revenue threshold of €750 million, apply tax nexus based on market thresholds rather than physical presence, and establish a de minimis amount for market thresholds.[182] It has also been suggested that a global minimum threshold would discriminate against United States big tech companies because such thresholds would conflict with international tax principles of non-discrimination.[183] Others have proposed alternatives to Pillar One: a multilateral solution that would eliminate the physical presence standard and expand on taxing rights that target automated digital services, and the implementation of a data excise tax based on volume of data collected.[184] Still, given the current status of measured progress towards any global agreement to implement BEPS 2.0, individual jurisdictions have begun turning to DSTs.

B. Digital Services Taxes Lead to Non-Uniform Taxation of Corporations

As jurisdictions await some measure of global consensus on the passage of BEPS 2.0, many have begun implementing DSTs to capitalize on revenue sources deriving from the digital economy. DSTs are designed to tax revenue from a variety of sources generated by digital companies, such as advertising, online marketplaces, online advertising, data sales, and social networking services.[185] India was the first nation to introduce a DST in 2016,[186] with at least 18 other

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[177] Heydon Wardell-Burrus, *Can Pillar 2 Be Leveraged to Save Pillar 1?*, TAX NOTES (July 18, 2022), https://www.taxnotes.com/special-reports/digital-economy/can-pillar-2-be-leveraged-save-pillar-1/2022/07/15/7dmst.

[178] Smith, *supra* note 43, at 1822.

[179] Katherine Dyer, *The Disproportionate Burden Of International Taxation On U.S. Digitally Based Entities*, 23 HOUS. BUS. & TAX L.J. 178, 179 (2023).

[180] *OECD Pillar Two (Global Minimum Tax),* TAX FOUND., https://taxfoundation.org/taxedu/glossary/oecd-pillar-2-global-minimum-tax/ (last visited Oct. 18, 2024).

[181] *Pillar 2: Updates from key jurisdictions*, GRANT THORNTON (Aug. 26, 2024), https://www.grantthornton.com/insights/articles/tax/2024/key-updates-on-the-global-implementation-of-pillar-2.

[182] Harpaz, *supra* note 72, at 95-101.

[183] *See id.* at 59; 85-87.

[184] Avi-Yonah et al., *supra* note 10, at 284; 334-40 (note that their proposed excise tax would target volume of data collected, measured in gigabytes).

[185] Gravelle, *supra* note 176, at 4. Notably, DSTs are imposed on revenue rather than profits, similar to sales taxes or excise taxes. *Id.*

[186] Sakshi Garg*, India's digital service tax landscape and its implications*, INDIA BUS. & TRADE (April 26, 2021), https://www.indiabusinesstrade.in/blogs/indias-digital-service-tax-landscape-and-its-implications/.

countries following suit.[187] Canada was the most recent country to implement a DST (effective June 28, 2024), targeting revenues derived from online marketplace services, online advertising services, social media services, and certain sales of user data.[188]

In addition to global jurisdictions, a number of U.S. states have proposed implementing some form of DST. For example, in 2021, Arkansas introduced a bill that would impose a sales tax on social media platforms with annual gross revenues of at least $500,000.[189] Connecticut introduced a similar bill that would impose a tax on companies deriving revenue from social media advertising services in the state.[190] Other states that have likewise introduced some form of unilateral tax on social media advertising, digital advertising, and/or the sale of consumer data include Massachusetts,[191] Indiana,[192] Montana,[193] New York,[194] Oregon,[195] Texas,[196] Washington,[197] West Virginia,[198] the District of Columbia,[199] and Nebraska.[200]

In 2020, Maryland became the first state to effectively enact a DST in the form of a digital advertising tax (DAT).[201] Imposed at varying rates of 2.5 percent to 10 percent,[202] Maryland's DAT targets large, multijurisdictional, Internet-based companies that derive significant revenue

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[187] Enache, *supra* note 32.
[188] *See Digital Services Tax*, GOV. OF CANADA, https://www.canada.ca/en/services/taxes/excise-taxes-duties-and-levies/digital-services-tax.html (last visited Oct. 18, 2024).
[189] *See* S.B. 558, 93rd Gen. Assem. Reg. Sess. (Ark. 2021).
[190] *See* H.B. 5646, 2021 Gen. Assem. Prior Sess. (Conn. 2021).
[191] *See* H. 2894, 192nd Leg. Sess. (Mass. 2021-2022) (imposing a 5% tax on the annual digital advertising revenue from companies that generate more than $25 million in digital advertising sales in Massachusetts); H. 4042, 193rd Leg. Sess. (Mass. 2021-2022) (imposing a 6.25% excise tax on the annual revenue from digital advertising services provided in Massachusetts, allowing an exemption for the first $500,000); H. 4179, 192nd Leg. Sess. (Mass. 2021-2022) (imposing a 6.25% gross receipts tax on revenue derived from digital advertising sales in Massachusetts, allowing an exemption of the first $1,000,000); and H. 3081 (imposing a varying digital advertising services tax rate (5% - 15%) on companies with minimum annual gross revenues of $50 million to over $200 million, and which derive at least $100,000 in annual gross revenues from digital advertising services in Massachusetts). H. 4179 is the only one of these bills still alive in the Massachusetts Legislature.
[192] *See* H.B. 1312, 2021 Sess. (Ind. 2021); H.B. 1572, 2021 Sess. (Ind. 2021).
[193] *See* LC 3237, 67th Leg. (Mont. 2021) (establishing a tax on digital advertising sales). *See also* H.B. 363, Reg. Sess. (Mont. 2021) (establishing a tax on digital advertising sales; died in process).
[194] *See* S. 01124, Gen. Assem. (N.Y. 2021-2022) (establishing a tax on digital advertising); S.B. 302, Leg. Sess. (N.Y. 2021-2022) (imposing a sales tax on digital advertising); A.B. 734, Leg. Sess. (N.Y. 2021-2022) (imposing a sales tax on digital advertising); and S. 4959, Gen. Assemb. (N.Y. 2021-2022) (creating an excise tax on the collection of consumer data by commercial data collectors).
[195] *See* H.B. 2392, Reg. Sess. (Or. 2021) (imposing a tax on the privilege of engaging the in the business of selling personal information).
[196] *See* H.B. 4467, 87th Leg. Reg. Sess. (Tex. 2021-2022) (imposing a tax on digital advertising services revenue).
[197] *See* H.B. 1303, Reg. Sess. (Wash. 2021-2022) (establishing a tax on the sale of Washington residents' personal information and related data).
[198] *See* HS. B. 605, Reg. Sess. (West Va. 2021) (establishing a state tax on digital advertisement revenue); and H.B. 4898, Reg. Sess. (West Va. 2020) (establishing a data mining service tax).
[199] *See* B23-0760, 23rd Council (D.C. 2021) (establishing a sales tax on the sale of digital and non-digital advertising services).
[200] *See* L.B. 989 Reg. Sess. (Neb. 2020) (imposing sales and use taxes on digital advertisements).
[201] *See* Md. H.B. 0732 (Reg. Sess.) (2020).
[202] *See* Md. Code Ann. Tax-Gen. §§ 7.5-101(e), 7.5-103 (2023) (stating that digital advertising services include "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising.").

from digital advertising sales.[203] Businesses generating less than $100 million in global annual sales, and $1 million in gross revenues from digital advertising in Maryland, are not subject to the tax;[204] nor is revenue generated from non-digital advertising sales.[205]

The main concern of domestic DSTs is that they are vulnerable to legal challenges; in particular, negative responses to Maryland's DAT were aggressive and immediate. Opponents have raised Constitutional challenges, arguing that the tax violates the Commerce and Due Process Clauses, and Permanent ITFA,[206] since it only targets digital advertising services, without including print or radio advertising services; thus imposing a discriminatory tax on e-commerce.[207] In addition, Maryland's DAT was cited as violating the Commerce Clause and First Amendment because it penalizes companies' out-of-state revenue efforts, and burdens select media outlets' digital speech.[208] However, at present, Maryland's DAT legally remains in good standing.

Globally, DSTs invite challenges about their fairness and viability. Some claim that DSTs discriminate against United States tech companies.[209] In 2021, the United States, along with Austria, France, Italy, Spain, and the UK issued a joint statement supporting the repeal of unilateral DSTs and corresponding retaliatory tariff threats upon implementation of the Pillar One rules.[210] However, the United States, UK, Spain, Austria, France and Italy more recently issued an statement that OECD member countries can maintain their existing DSTs until the implementation of Pillar One, a timeframe of which is currently unknown.[211]

Amidst the current stalled or jagged statuses of taxing data (whether via the BEPS Project, or DSTs), legal scholars have opined on the viability and effectiveness of DSTs. Some offer normative implications for policymakers considering implementing DSTs,[212] emphasizing that

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[203] Natasha Nandlal Varyani, *Social Justice & Multi-Jurisdictional Tax: A Critical Examination of The Digitization of Commerce, Multi-Jurisdictional Tax & An Opportunity to Correct a Systemic Preference To Protect Wealth*, 50 CAP. U.L. REV. 91, 107 (2022).

[204] *Id*. (Global revenue amounts are current with the changes from Executive Order 01.01.2023.02). *See also* Kim & Shanske, *supra* note 33, at 747-48.

[205] Cowan, et al., *supra* note 89, at 864.

[206] *See* Chamber of Commerce v. Franchot, No. 21-cv-00410 (D. Md. Feb. 18, 2021); Chamber v. Franchot, 595 F. Supp. 423 (D. Md. 2022); Comcast of California/Maryland/Pennsylvania/Virginia/West Virginia, LLC, et al. v. Comptroller of the Treasury of Maryland, No. C-02-CV-21-000509 (Md. Cir. Ct. Apr. 15, 2021.). Implemented in 1998, and made permanent in 2016, the ITFA bars states from imposing multiple or discriminatory taxes on e-commerce.

[207] *See* Cowan et al., *supra* note 89, at 862-63 (discussing the potential discriminatory effects of data taxes on the permanent ITFA).

[208] Beebe, *supra* note 44 (offering, "Because the [Maryland DAT] is based on a company's global revenue, multistate or multinational companies may pay higher taxes than companies with only Maryland-based operations). *See also* Grosjean v. American Press Co., 297 U.S. 233 (1936) (holding that a tax on newspaper publishers violated First Amendment rights by inhibiting circulation); and Minneapolis Star & Tribune Co. v. Minn. Comm'r, of Revenue, 460 U.S. 575 (1983) (holding that Minnesota's ink and paper tax violated First Amendment rights by singling out the press and targeting select newspapers).

[209] Gravelle, *supra* note 176, at 2.

[210] *Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect*, U.S. DEPT. TREAS. (Oct. 21, 2021), https://home.treasury.gov/news/press-releases/jy0419.

[211] *The OECD and Digital Services Tax*, *supra* note 31.

[212] *See generally* Kim, *supra* note 21.

current tax systems are "archaic" given modern digitized business models,[213] and promoting DSTs as a means of capturing tax revenue not tethered to historic physical presence standards.[214] Others acknowledge that current tax regimes fail to account for the massive value being generated by user data,[215] and suggest that states consider implementing DSTs as an effective means of taxing the digital economy.[216]

Unless or until a unified agreement ensues that would help bring the global tax system into alignment, and curb tax avoidance in the modern digital economy, jurisdictions appear to be moving forward unilaterally.[217] While there does exist some headwind for both the BEPS project and DST s, neither should be entirely discounted as they remain the most viable options to adapt tax collection to the modern digital age.[218] Still, select realities remain clear: the digital economy is here to stay, and is growing rapidly; and securing a globally agreed upon tax framework to deal with the realities of the digital economy is proving difficult. As Part III of this article next highlights, GAARS can help by serving as effective tax collection mechanism in this evolving era. GAARs can not only increase the likelihood of preventing tax avoidance, but can make tax collection more effective in an increasingly global and digital modern economy.

III. A Case for a Robust GAAR to Deter Digital Tax Avoidance

The digital economy is increasingly reshaping global markets.[219] Sources of value have shifted from the tangible, to the intangible, thus inviting opportunities for MNCs to circumvent archaic tax laws by effortlessly shifting profits from high- to low-tax jurisdictions.[220] Jurisdictions wanting to tax income deriving from the digital marketplace are frustrated, given that current tax regimes are tethered to income tax models reliant upon brick-and-mortar physical presence standards.[221] Efforts have been slow to evolve global tax systems toward a universal framework to capture lost revenue.[222]

Governments need a legal mechanism that is not only effective enough to capture digitally-sourced revenue, but also flexible enough to adapt to rapidly evolving changes to the digital economy. In addition, such a mechanism should be equipped to withstand attempts by MNCs and others to deliberately circumvent their legal obligations to pay taxes through transactions either lacking economic substance, and deliberately constructed to avoid tax payments.

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[213] *Id*. at 135.
[214] *Id*. at 158-63; 169-173; 173-84.
[215] *See* Appleby, *supra* note 9, at 2.
[216] *Id*. at 11-15.
[217] Brendan Nafarrate, *Combatting Base Erosion and Profit Shifting: Is a Digital Service Tax on Revenue the Right Path Toward Equitable International Taxation?*, 27 SW. J. INTL' L. 368, 373 (2021) (citing example of France's DST and noting intent of French parliament to "break any impasse at the OECD level and push countries to reach an international solution.").
[218] *See, e.g.*, Daniel Bunn, Alan Cole, & Alex Mengden, *Anti-Avoidance Policies in a Pillar Two World*, TAX FOUND. (Oct. 17, 2023), https://taxfoundation.org/research/all/global/base-erosion-profit-shifting-pillar-two/.
[219] *See supra* Part I.A.
[220] *See supra* Part I.C.
[221] *See supra* Part I.B.
[222] See supra Part II.A & B.

This article proposes that a robustly drafted and enforced GAAR can be used to deter tax avoidant behavior. GAARs can protect the integrity of tax systems when domestic tax systems are inadequate to tax the digital economy. GAARs also have significant elasticity to flexibly adapt to a variety of transactions. While no panacea, GAARs represent a significant step toward evolving current physical presence tax systems amidst a modern and rapidly changing digital environment. To further this article's proposal, Part III proceeds as follows. Subpart A defines GAARs, and explains how GAARs are generally applied to tax avoidant transactions. Subpart B highlights the advantages and limitations of GAARs, noting that while GAARs are not a panacea for all tax avoidance efforts, they offer numerous benefits that can be leveraged when deployed against MNCs. Subpart C examines the applicability of GAARs in civil law systems, where precedential value is less influential on clarifying the reach of broad statutory language. Subpart D articulates necessary attributes for a robust GAAR, including optimal burden of proof allocation and using mutually reinforcing statutory tools that can optimize a GAARs impact. Subpart E highlights New Zealand's GAAR as an exemplar of an effective and well-enforced tax enforcement system, and highlights the attributes and applications that make GAARs successful. Finally, Subpart F proposes how best to augment a robust GAAR with carrots and sticks, and explores the potential of a novel tax program designed to deter even the most aggressive of tax avoiders in the new digital economy.

A. The GAAR: Definition and Application

A GAAR is an enforcement mechanism that grants a taxing authority broad and general power to deny a taxpayer the tax benefits of a particular transaction.[223] GAAR provisions do not prohibit specific types of transactions, but instead serve as a catch-all mechanism to disallow the tax benefits of transactions whose primary purpose is to avoid payment of tax[224]—something MNCs have become quite adept at via profit shifting.[225] GAARs are designed to thwart schemes that are not necessarily captured by the letter of the law, but are intended to fall within the spirit of the particular tax system.[226] In this way, GAARs act as a provision of last resort that is often deployed to scrutinize the most stubborn forms of tax abuse perpetrated by tax avoidant entities.[227] Unlike their specific and rules-based tax law counterparts, a GAAR is a principles-based rule that—untethered to a specific type of tax requirement—can scrutinize virtually any avoidant scheme no matter how cleverly drafted by the taxpayer. Although GAARs are deployed today to respond to a wide range of tax avoidance, they have existed in multiple jurisdictions for decades.[228]

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[223] Mary Cowx & John N. Kerr, *The General Anti-Avoidance Rule* 1, SSRN (2024), *available at* https://ssrn.com/abstract=3485084.
[224] *Id.*
[225] *See supra* Part II.C.
[226] Cowx & Kerr, *supra* note 223; *see also supra* text accompanying notes 167-72.
[227] *See, e.g.,* Genevieve Loutinsky, *Gladwellian Taxation: Deterring Tax Abuse Through General Anti-Avoidance Rules*, 12 HOUS. BUS. & TAX. L. J. 82, 103 (2012); Vasiliki Athanasaki, *GAARS: Sui Generis Tax Provisions or Just a Simple Reminder of Proper Interpretation of Law?*, 32 J. INT'L TAX. 53, 56 (2021).
[228] *See also* Jay A. Soled, *Upstream Tax Planning: A Case Study of Why Congress Should Institute a General Anti-Abuse Rule*, 99 N.C. L. REV. 643, 676 n.180 (2021).

Three conditions must generally exist before a GAAR can be applied to a transaction. First, there must be a scheme of some kind initiated by a taxpayer, which could be a course of action, proposal or other undertaking.[229] The scheme can be a single transaction, or a series of transactions that constitute an overall scheme to be evaluated.[230] The scheme can also be part of a larger transaction that is otherwise outside the scope of the GAAR.[231] Virtually any taxpayer transaction that does not fall within the scope of a more specific tax statute can be considered a scheme for purposes of evaluation under a GAAR.

Second, the scheme must implicate a tax benefit, such as a reduced obligation to pay tax, a credit or offset, or an exemption of income or other sources of value.[232] This can also include postponing tax liability or obtaining any other advantage arising from a delay of tax payment.[233] A tax benefit also includes anything that results in a portion of gross revenue being exempt, or some amount that would otherwise be subject to taxation to become a nontaxable benefit.[234] The mere presence of a benefit to the taxpayer, however, does not necessarily fall within the scope of a GAAR. Taxpayers that rely on a tax benefit or incentive that is specifically articulated in the tax law or otherwise consistent with the tax statute should not expect special scrutiny.[235]

Finally, the scheme typically (though as will be shown later not always), must be for the sole or dominant purpose of obtaining a tax benefit.[236] This is determined by examining a number of factors including how the scheme was executed, to what extent the scheme appears artificial or contrived, the presence of a divergence between form and substance, and the result achieved compared to a relevant counterfactual scenario.[237] The purpose of the scheme is not primarily driven by the taxpayer's subjective state of mind; however, the taxpayer would need to provide objective evidence that shows a dominant purpose of the scheme was for a reason *other than* obtaining the tax benefit.[238]

This dominant purpose requirement does not mandate that a taxpayer must structure their transactions to maximize their level of tax liability. Tax management, also known as tax planning, is a legitimate practice; the goal of which is to decrease tax liability using existing provisions of the law. Firms can legitimately use tax planning to reduce their liability, increase profitability, add shareholder value, or other benefits.[239] A GAAR's dominant purpose requirement, for example, should also not restrict a taxpayer's choice of financing between debt

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[229] Christophe Waerzeggers & Cory Hillier, *Introducing a General Anti-Avoidance Rule (GAAR)*, TAX L. IMF TECH. NOTE, at 1, 2 (Jan. 2016).
[230] Waerzeggers & Hillier, *supra* note 229, at 2.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.* at 3.
[235] *Id.*
[236] *Id.* A notable exception to the 'sole or dominant purpose' requirement is New Zealand's GAAR. This GAAR is discussed more fully *infra* at Part III.E.
[237] *Id.*
[238] *Id.* at 4 (emphasis added).
[239] Fariz Waerzeggers & Bonnie K. Klamm, *Tax Avoidance, Tax Management and Corporate Social Responsibility*, 18 J. CORP. FIN. 804, 806 (2012); *see also supra* text accompanying notes 168-72.

and equity based on their deductibility.[240] An example of a prototypical GAAR statute, similar forms of which are used by numerous jurisdictions, is presented in Exhibit A.

GAARs take a variety of forms. The United States, for example, has traditionally avoided implementing an overarching GAAR that would enable enforcement authorities to reclassify transactions as abusive.[241] Instead, the United States relies on a patchwork of principles that perform a similar function as GAARs.[242] These include challenging transactions for tax purposes when they emphasize form over substance, questioning the legitimacy of transactions that lack a business purpose, and disputing conduct that is deemed to be little more than a sham transaction designed to circumvent tax payments.[243] For example, Internal Revenue Code (IRC) Section 7701(o) codifies the economic substance doctrine, which states in part that a tax benefit can be disallowed by the courts if it goes beyond the Congressional intent of the relevant statute.[244] Likewise, IRC Section 482 requires that a product sold by a United States parent to a controlled foreign corporation must be transferred at an 'arm's length' price and not one that artificially avoids tax liability.[245]

Other countries have established national GAARs. Canada's GAAR prevents Canadian taxpayers from claiming tax benefits arising from abusive tax planning, and has been expanded to lower the threshold for how much of the transaction must be considered tax avoidant in order to deny the claimed tax benefits.[246] Even if a transaction has a primarily legitimate purpose, it may still be treated as an avoidant transaction if one of the "main purposes" of the transaction is to claim a tax benefit.[247] After years of delay, India enacted a GAAR which requires taxpayers to engage in bona fide transactions rather than transactions that lacked any business purpose other than to avoid tax or were considered by the government to be a sham transaction.[248] Mexico introduced a

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[240] Waerzeggers & Hillier, *supra* note 229, at 4.
[241] Shay Menuchin & Yariv Brauner, *United States, in* GAARS – A KEY ELEMENT OF TAX SYSTEMS IN THE POST-BEPS WORLD 765, 765 (Michael Lang et al., eds. 2016).
[242] Daniel T. Ostas, *Endogenous Tax Law: Regulatory Capture and the Ethics of Political* 85 LAW & CONTEMP. PROBS. 49, 52 (2022).
[243] *Id.* The business substance doctrine, also known as the substance over form doctrine, arises when the government "suspects that a taxpayer entered into a transaction to achieve ends other than those proffered by the taxpayer as its primary motivation.". *See also Doctrinal Tools the IRS Will Use to Challenge Claimed Tax Benefits of 'Micro' Captive Insurance Companies*, CARLTON FIELDS (July 17, 2015), https://www.carltonfields.com/insights/publications/2015/doctrinal-tools-the-irs-will-use-to-challenge-clai (The business purpose doctrine "will not give effect to transactions that lack a primary business purpose other than tax avoidance."). *Id* (emphasis omitted). In addition, ("[i]f a taxpayer only outwardly appears to engage in a transaction but has otherwise taken measures to ensure that it will have no substantive effect, the transaction is said to be a 'sham'" . . . and no tax benefits will arise from the transaction.). *Id.*
[244] Rebecca Rosenberg, *Codification of the Economic Substance Doctrine: Agency Response and Certain Other Unforseen Consequences,* 10 WM. & MARY BUS. L. REV. 199, 205-06 (2018) (citing I.R.C. § 7701(o) (2012)).
[245] Menuchin & Brauner, *supra* note 241, at 765-66. *See also* Bret Wells & Cym Lowell, *Tax Base Erosion: Reformation of Section 482's Arm's Length Standard*, 15 FLORIDA TAX. REV. 737, 745-47 (2014).
[246] *Significant Changes to GAAR: What You Need to Know*, DOANE GRANT THORNTON (Jun. 21, 2024), https://www.doanegrantthornton.ca/insights/significant-changes-to-gaar/.
[247] *Id. See also EY Indirect Tax,* 35 J. INT'L TAX'N 31, 31-32 (2024) (summarizing amended Canadian Bill C-59 which was enacted in 2024).
[248] *See* LOWELL, MARTIN & LEVEY, INT'L TRANS. PRICING O.E.C.D. GUIDELINES ¶ 14.14[1][a] (2024) (summarizing the development of India's GAAR). *See also General-Anti Avoidance Rules (GAAR): India and National Experience,* DELOITTE (2017), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/in-tax-gaar-india-and-international-experience-noexp.pdf.

GAAR in 2020 that enabled its tax administration service to deny tax benefits arising from transactions that lacked a business purpose and generate a tax benefit for the taxpayer.[249]

GAARs also govern transactions in the EU. In 2016, The EU Council adopted the Anti-Tax Avoidance Directive (ATAD), which sought to establish a minimum level of harmonization and protection against tax avoidant practices for national tax systems across the EU.[250] The ATAD required all member states to integrate five corporate anti-avoidance rules into their national laws by January 1, 2019.[251] These anti-avoidance rules include interest limitation rules that discourage tax minimizing debt arrangements, exit taxation rules that prevent firms from relocating assets to avoid tax, profit shifting rules that deter shifting assets to a dependent company in a low-tax jurisdiction abroad, and hybrid mismatch rules that thwart companies from exploiting national mismatches to circumvent taxation.[252]

The ATAD also includes a GAAR, which enables member states to ignore any arrangement which exists "for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances."[253] Furthermore, arrangements will be "regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality."[254] Facilitating these rules is a Directive on Administrative Cooperation, which mandates the automatic exchange of financial information between countries in order to circumvent tax avoidance and protect the integrity of national tax systems.[255]

The ATAD has been largely successful in implementing harmonized protections against tax avoidance across the EU. With a few exceptions,[256] national governments have successfully introduced legislation in compliance with the ATAD, and the ATAD has been applied in subsequent tax cases.[257] Terms in the ATAD were defined broadly in order to acquire unanimous

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[249] Armando Lara Yaffar, Michel Sanchez O'Sullivan, Douglas Poms, and Quyen Huynh, *Mexican GAAR: Recent Ruling Leads to More Questions Than Answers*, TAX MGMT INT'L J. (June 13, 2024), https://kpmg.com/kpmg-us/content/dam/kpmg/pdf/2024/mexican-gaar-recent-ruling-leads-to-more-questions-than-answers-061424.pdf. *See also* Pedro A. Palma & Eduardo Barreira-Reynoso Monterrubio, *The Mexican General Anti-Abuse Rule and its Application to International Tax Treaties*, INT'L BAR ASSOC. (n.d.), https://www.ibanet.org/article/10ED291E-E505-456D-8DAB-7670F53994CA.
[250] Aitor Navarro, *The General Anti-Avoidance Rule of the EU Anti-Tax Avoidance Directive (ATAD GAAR): Interpretation and Implementation* 3 (Max Planck Inst. For Tax Law & Pub. Fin., Working Paper 2024-08).
[251] *Assessment of Recent Anti-Tax Avoidance and Evasion Measures (ATAD & DAC 6)*, at 10 (Mar. 2022), *available at* https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703353/IPOL_STU(2022)703353_EN.pdf [hereinafter EU ATAD ASSESSMENT].
[252] *See* Council Directive 2016/1164, 2016 O.J. (L 193/1) 1, 7-13. *See also Anti-Tax Avoidance Directive: An EU Directive to Counter Corporate Tax Avoidance*, EURO. COMM'N (n.d.), https://taxation-customs.ec.europa.eu/taxation/business-taxation/anti-tax-avoidance-directive_en.
[253] Council Directive 2016/1164, *id* at 11.
[254] *Id.*
[255] *See* Colino, *supra* note 143, at 438; *see also All You Need to Know About the Directive on Administrative Cooperation (DAC)*, ECLEAR (n.d.), https://eclear.c..om/understanding-the-directive-on-administrative-cooperation-dac/.
[256] EU ATAD ASSESSMENT, *supra* note 251, at 12.
[257] *Id.* at 8 ("The ATAD has been faithfully and timely implemented in virtually all aspects by all Member States."). *See also id.* at 12 (presenting a Table listing implementation status by country and rule). *See also* Błażej Kuźniacki,

adoption of the directive, allow EU member states more flexibility in their implementation in national legislation, and facilitate swift application of ATAD standards in practice.[258]

Although generally successful, the ATAD is not without criticism. Scholars have questioned whether the ATAD would impair the EU's competitiveness by incentivizing companies to relocate elsewhere, resulting in job losses for citizens.[259] Furthermore, ATAD's aforementioned broad standards have been criticized as being vague and redundant with one another.[260] This leaves national courts, and ultimately the European Court of Justice, to fully define the reach of the ATAD in specific situations.[261]

B. The GAAR: Advantages and Limitations

GAARs are powerful mechanisms used to enforce the intent of a taxing authority for several reasons. First, due to their broad and flexible nature, GAARs can reinforce current tax systems when the current system's rules are too difficult to apply to novel transactions.[262] This is particularly true when specific anti-avoidance rules (SAARs), targeted to deny benefits to a specific type of transactions, are weak, ineffective, or non-existent.[263] GAARs can therefore address novel transactions that were not anticipated at the time the relevant tax rules were drafted—to include the rapid evolution of the digital economy.[264]

The breadth and flexibility of GAARs are well-suited for deterring MNC's tax avoidant schemes. This is especially true for companies whose primary business involves intangible capital, such as patents and algorithms, compared to other industries.[265] This mobility of capital enables MNCs to target jurisdictions that have the greatest opportunity for exploiting statutory loopholes. For example, MNCs skillfully used what Nobel-Prize winning economist Paul Krugman called "leprechaun economics" in leveraging Ireland's tax laws to their own economic advantage.[266]

The C.J.E.U. Case Law Relevant to the General Anti-Avoidance Rule (G.A.A.R.) Under the Anti-Tax Avoidance Directive (A.T.A.D.), 4 U. BOLOGNA L. REV. 261 (2019) (surveying relevant case law).

[258] *See* EU ATAD ASSESSMENT, *supra* note 251, at 47.

[259] *See, e.g.*, Irma Mosquera Valderrama, *A New Wind Change in Direct Taxation*, 21 GERMAN L.J. 90, 93 (2020); Ana Paula Dourado, *Taxes and Competitiveness: How Much Competitive is European Tax Competition*, 46 INTERTAX 942, 943 (2018) (recommending that further harmonization of laws will improve European Union competitiveness).

[260] Navarro, *supra* note 250, at 8.

[261] *Id.* at 39.

[262] Julie Cassidy, *GAAR (Anti-Avoidance) v GAAR (Anti-Abuse)*, 30 J. INT'L TAX'N 51, 52 (2019).

[263] *Id.* at 52. Examples of SAARs include debt manipulation, rules against transfer pricing manipulation, and under-capitalization. *See also* Cowx & Kerr, *supra* note 223, at 6.

[264] Cassidy, *supra* note 262, at 52.

[265] Annette Alstadsæter, Sarah Godar, Panayiotis Nicolaides, & Gabriel Zucman, *Global Tax Evasion Report 2024*, EU TAX OBSERVATORY 41 (2024), https://www.taxobservatory.eu/www-site/uploads/2023/10/global_tax_evasion_report_24.pdf.

[266] Arthur Sullivan, *Apple Irish Tax Case Shows Global Problem*, DW (July 23, 2020), https://www.dw.com/en/apple-ireland-tax-avoidance/a-54274213. A GAAR, however, may have little effect when a national jurisdiction embraces its role as a tax haven for MDCs; *see also* Liz Alderman, *Ireland's Days as a Tax Haven May Be Ending, but Not Without a Fight*, N.Y. TIMES (July 8, 2021), https://www.nytimes.com/2021/07/08/business/ireland-minimum-corporate-tax.html.

GAARs can protect the integrity of tax systems from MNC avoidance when other tax laws fail, facilitating capture of revenue otherwise untaxed through legislative loopholes.

Second, GAARs help prevent the game of cat and mouse between taxpayer and taxing authority.[267] Tax statutes are often updated to accommodate changes in public policy or evolutions in tax practice. They are also updated to close unintended gaps in statutory language. However, the lag time between the identification of gaps or public policy changes, and the corrective legislation that addresses those issues, can be significant. Furthermore, correction of enacted rules requires time and effort by taxing authorities, and is only effective until new loopholes are found.[268] Entities can exploit these lags to defeat the purpose of the taxing authority, and avoid responsibility for a significant period of time.[269] GAARs can reduce these temporal gaps by filling in as enablers of legislative intent until such gaps are closed.[270]

The gap-filling role is particularly useful for counteracting the conduct of MNCs. Armed with knowledgeable tax professionals, MNCs are skilled at finding loopholes.[271] Flush with $2.8 billion in unpaid taxes to the world's poorest countries,[272] GAARs help neutralize those advantages that MNCs most effectively possess because their underlying language is driven by broad principles of anti-avoidance, rather than particular mechanisms of taxation. GAARs thus short circuit loophole-exploitative behavior, making the game of cat and mouse significantly more difficult for MNCs.

An effective GAAR can also alleviate negative effects of tax avoiders on a taxpaying society. Every population displays a level of tax morale towards its taxpaying obligations. Tax morale is the willingness of a population to pay taxes that fall beyond the standard utility calculations of sanction and reward.[273] For example, taxpayers may be motivated to pay taxes because doing so sustains social advancement, or because of prevailing cultural norms.[274]

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[267] *See* Ulrich Palm, *Country Report: Germany, in* A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 149, 191 (Karen B. Brown ed., 2012) (describing tax avoidance as a "cat-and-mouse game between the small minority of taxpayers who abuse the tax system and deceive the government" and concluding that "[t]This dynamic process will not end until a fundamental reform which radically simplifies the tax system is adopted.").
[268] Martin J. McMahon, Jr., *Beyond a GAAR: Retrofitting the Code to Rein in 21st Century Tax Shelters,* 98 TAX NOTES 1721, 1736 (2003).
[269] *Id.*
[270] Loutinsky, *supra* note 227, at 86.
[271] *See generally* Boris I. Bittker, *Income Tax "Loopholes" and Political Rhetoric*, 71 MICH. L. REV. 1099, 1103 (1973). The author analogizes the discovery of a loophole to a valuable finding in archeological excavation:

> When discovered by a tax expert, . . . a loophole is a wasting asset that he must exploit quickly but warily. His clientele must be informed of his discovery if he is to reap a financial benefit from it, but when he exposes it to view, he reduces its life expectancy by stimulating Congress to enact corrective legislation. His dilemma resembles that of the archeologist whose excavation brings an ancient fresco to light but simultaneously exposes it to the destructive forces of nature.

Id.
[272] Rupert Neate, *Big Tech Accused of Avoiding $2.8bn in Tax to Poorest Countries*, THE GUARDIAN (Oct. 25, 2020), https://www.theguardian.com/business/2020/oct/26/big-tech-accused-of-avoiding-28bn-in-tax-to-poorest-countries.
[273] Erzo F. P. Luttimer & Monica Singhal, *Tax Morale*, 28 J. ECON. PERSP. 149, 150 (2014).
[274] *Id.*

A sustained practice of successful tax avoidance, particularly by wealthy companies with a global reach, can erode tax morale. Such tax avoidance can frustrate the public that believes in an inherently just system of taxation, and encourage the perception that paying taxes is inherently unfair.[275] When taxpayers believe that companies such as MNCs are exploiting loopholes, they are less likely to fulfill their own tax obligations.[276] Conversely, if individuals believe that others are properly fulfilling their own tax obligations, it increases the motivation of others pay taxes.[277] A GAAR can thus counter the perception that MNCs are not paying their fair share, and help sustain the tax morale of the broader society.

Finally, an effective GAAR can narrow the fairness gap between sophisticated and unsophisticated taxpayers.[278] It is generally taxpayers with the greatest wealth and the greatest amount to gain—like MNCs—that have the resources and sophistication to construct complex avoidant transactions that can circumvent liability. Most individuals and small businesses generally lack those resources. The more effective a GAAR is in thwarting tax abusive behavior, the more effective it is in curbing inequality between those who have enough resources to practice tax avoidance profitably, and those who do not.

Although GAARs have many strengths, they are not without limitations. Unlike bright line tax rules, a GAAR is applied after the taxable event occurs. Tax authorities will challenge a completed transaction as violative of the GAAR. This creates uncertainty for companies because they will not be able to entirely predict their after-tax rates of return based upon their anticipated transactions.[279] This certainty helps manage allocation of capital for future planning.[280] A GAAR that is applied too arbitrarily, or without sufficient basis in legislative goals, risks becoming a kind of "legislative eraser" that rewrites tax law with each new interpretation.[281] Such a GAAR does not serve its intended purpose and can unduly burden otherwise legitimate and well-intentioned tax planning.

Second, a GAAR is vulnerable to selective application. Since a GAAR is applied to each case individually, only a portion of taxpayers subject to a GAAR will attract government scrutiny.[282]

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[275] *See supra text* accompanying notes 148-51.
[276] Cassidy, *supra* note 262, at 53; Benno Torgler, *Tax Morale in Latin America*, 122 PUB. CHOICE 133, 153 (2005). This principle also holds in economies of the global south. *See, e.g.,* Akan David Chucks & Odita Ogomrgbunam Anthony, *Tax Morale and Its Effect on Taxpayers' Compliance to Tax Policies of the Nigerian Government*, 12 INT'L J. BUS. & MGMT. 35, 47 (2013) (finding that tax morale has a statistically significant effect on tax compliance in Nigeria).
[277] Torgler, *supra* note 276, at 153.
[278] *See* Carl MacArthur, *Chapter 3 Canada, in* A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 65, 87 (Karen B. Brown ed. 2012) (noting that a GAAR "seeks to balance a taxpayer's right to certainty in planning its affairs with the need to preserve the fairness of the system for all taxpayers.").
[279] Richard Krever, *General Report: GAARs, in* GAARS – A KEY ELEMENT OF TAX SYSTEMS IN A POST-BEPS WORLD 1, 2 (Michael Lang et al., eds. 2016); Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 ST. LOUIS U. L.J. 21, 28 (2010).
[280] Krever, *supra* note 279, at 2.
[281] Eugen Trombitas, *Trinity Exposed: Does the Emperor Really Have No Clothes or is He Wearing an Unusual Silver Rugby Jersey? - The Latest News from the GAAR Front*, 13 NEW ZEAL. J. TAX. L. & POL'Y 583, 591 (2007).
[282] Krever, *supra* note 279, at 2.

Within this group of taxpayers who are subject to this scrutiny, only a further subset will have the rule applied successfully against them.[283] This may create a climate of unfairness as some taxpayers receive greater scrutiny than others for similarly situated transactions. It is this concern of arbitrary taxation that is a significant objection in some countries to introducing a statutory GAAR.[284]

However, these concerns over GAARs can be exaggerated, particularly when applied to MNCs. GAARs do not simply enable tax authorities to challenge transactions at random. Tax authorities also cannot use a GAAR to challenge a transaction simply because it believes the transaction is unfair.[285] GAARs generally are embedded with multiple and specific criteria that guide tax authorities in their application. Furthermore, as GAARs are enforced, their application gains further specificity. Patterns develop highlighting which arrangements are likely to be challenged by the rule and which will not be scrutinized.[286] Skilled legal and tax professionals consulting MNCs will be well aware of the criteria and potential developments, and be able to offer effective guidance.

GAARs also create uncertainty. As a GAAR is a principle-based statutory framework, rather than a specific bright line rule, some uncertainty is inevitable. However, while high levels of uncertainty are problematic, some uncertainty can be desirable because it encourages voluntary compliance with tax rules.[287] Counterintuitively, clear rules can even be detrimental by serving as a roadmap for tax avoiders wishing to comply with the letter—and not spirit of—the law.[288] Firms wanting to avoid government scrutiny may police themselves in refraining from undertaking transactions that potentially fall within the grasp of a somewhat uncertain GAAR.[289]

Such concerns are muted in the context of taxing sophisticated MNCs. Highly skilled tax professionals can offer sophisticated advice to minimize the tax exposure for almost any transaction. As one commentator remarked in the context of tax avoidance, "[t]hose who sail too close to the wind should not complain if they get wet."[290] If there is any group of companies that could cleverly sail close to the wind without getting sprayed, it is those MNCs practicing tax avoidance.

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[283] *Id.*

[284] *E.g.*, Takayuki Nagato, *A General Anti-Avoidance Rule (GAAR) and the Rule of Law in Japan*, 13 PUB. POL'Y REV. 35, 63 (2017) noting that "[i]t is the fear of arbitrary taxation that is the chief objection to introducing a statutory GAAR into Japan.")

[285] *Id.* at 36.

[286] Krever, *supra* note 279, at 2

[287] McMahon, *supra* note 267, at 736.

[288] Emily Cauble, *Presumptions of Tax Motivation*, 105 IOWA L. REV. 1995, 2032 (2019) ("[O]ne outgrowth of the underinclusivity of rules dictating unfavorable tax outcomes is the frequent lament that clear rules serve as a roadmap for taxpayers who want to engage in abusive transactions that comply with the letter, but not the spirit, of the law.").

[289] John Azzi, Book Review, *Tax Law Design and Drafting (Vol. 2): Comparing Income Tax Laws of the World*, 18 BERKELEY J. INT'L L. 196, 200 (2000).

[290] Michael Littlewood, *Tax Avoidance, the Rule of Law and the New Zealand Supreme Court*, 2011 NEW. ZEAL. TAX. REV. 35, 66.

C. Application of GAARs in Civil Law Systems

Much of this paper focuses on GAARs in common law systems like the United States, UK, and New Zealand. Under such legal systems, GAARs gain further specificity through repeated applications, as judicial decisions help refine which transactions are most likely to withstand legal scrutiny. In civil law jurisdictions, rights are framed in a more general and abstract manner than in their common law counterparts.[291] Nonetheless, civil law courts have successfully relied on general legal principles already embedded their legal code and applied them to the tax context.[292]

In France, for example, the established doctrine of *abus de troit* (abuse of law or avoidance of the law), imposes sanctions against those who exceed the limits of a right's reasonable use.[293] French authorities have applied this tax principle to stop avoidant transactions.[294] Similarly, in Germany, the established civil law doctrine of *Rechtmissbrauch* (abuse of rights or abuse of law) has been applied to tax cases by disallowing any legal arrangement that constitutes an abuse of rights.[295] Section 42 of the Federal Code of Tax Procedure enshrines this principle by requiring the taxpayer to be taxed according to the actual economic substance of the transaction and not its artificial form.[296]

Both France and Germany have successful GAARs. Germany has both a GAAR and SAAR codified in legislation, with the goal to prevent circumvention of established German tax legislation.[297] German tax authorities apply the GAAR when a claimed tax advantage from a transaction is achieved artificially and not in line with the objective of the relevant tax legislation.[298] This tax advantage is compared against a transaction whose structure is appropriate and in line with relevant tax legislation.[299] French law permits tax authorities to disregard the tax

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[291] Zoë Prebble and John Prebble, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law*, BULL. INT'L TAX'N 151, 152 (2008)
[292] *Id.*
[293] *Id.* at 158.
[294] *Id.* at 160.
[295] *Id.* at 152-53. *See also* Tracey Bowler, *Countering Tax Avoidance in the UK: Which Way Forward?* 167 (Inst. Fiscal Stud., TLRC Disc. Paper No. 7, Feb. 2009), https://ifs.org.uk/sites/default/files/output_url_files/dp7.pdf ("Underlying German civil law is the doctrine of 'Rechtsmissbrauch' (abuse of law or rights). In the context of taxation, the German equivalent of a GAAR is Section 42 of the Federal Code of Tax Procedures, which disallows the tax effect of any transactions that constitute an abuse of law or rights.").
[296] *Id.* at 153. *See also* Ulrich Palm, *Chapter 7: Germany*, *in* A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 149, 175-77 (Karen B. Brown, ed., 2012).
[297] Linda Pfatteicher et al., *General Anti-Avoidance Regimes Gain Prominence in the Ever-Developing World of Global Tax Policy*, SQUIRE PATTON BOGGS (2017), https://www.squirepattonboggs.com/-/media/files/insights/publications/2017/02/general-antiavoidance-regimes-alert.pdf; *see also* Markus Seiler, *GAARs and Judicial Anti-Avoidance in Germany, the UK and the EU,* SERIES ON INT'L TAX L. 38 (H.C. Michael Lang ed., 2016). German tax law also has the underlying benefit that it is less complex than other nations, leaving fewer possibilities for avoidance and evasion and thus fewer abusive arrangements compared to other jurisdictions. *See* Athanasaki, *supra* note 227, at 18.
[298] Jan Adami, *Purpose Tests in Anti-Abuse or Anti-Avoidance Provisions in Germany* EURO. TAX. BLOG (Jul. 31, 2023), https://www.europeantax.blog/post/102ikbq/purpose-tests-in-anti-abuse-or-anti-avoidance-provisions-in-germany.
[299] *Germany Country Profile*, KPMG: EU TAX CENTRE (May 2021), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2021/08/germany-country-profile-2021.pdf.

advantages of transactions that constitute an abuse of law.[300] An abuse of law incorporates transactions that are either fictitious in nature or apply a literal application of law that is against the tax law's purpose.[301] A transaction whose main objective, or one of its main objectives, is to acquire a tax advantage will be ignored by French tax authorities.[302]

Where such general principles are unclear or inconsistently applied, a GAAR in a civil law country can help clarify principles of regulation and provide common definitions for key terms relevant to tax avoidance. For example, Italy embedded in its civil law principles the concept of preventing an abuse of rights similar to that found in Germany and France.[303] Italian law also contains the requirement to act consistently with good faith.[304] Although useful concepts, the Italian tax system suffered from unnecessary fragmentation.[305] Italian tax laws were also not fully codified and legal principles were applied inconsistently across legal domains.[306]

This changed in 2015 when an Italian GAAR was enacted that clarified the definitions of key concepts such as "economic substance" and "undue tax advantage," thereby enabling the Italian code to utilize these principles consistently across the various areas of tax law.[307] The GAAR also clarified that, unlike tax evasion, criminal charges do not generally arise from GAAR provisions.[308] This distinction is generally not necessary in a common law system, but it represents a change from prior Italian law where criminal courts considered tax avoidance as a criminal offense.[309] The result was a GAAR that both clarified and improved a civil law system limited by fragmentation and inconsistent application of tax principles.

The presence of a civil law system is no barrier to the introduction to a GAAR. General legal principles such as abuse of rights or abuse of law provide a supportive foundation for dealing with problems of tax avoidance. A GAAR can provide further specificity to these principles, making both the GAAR standards and the general legal principles more effective as a result.

D. Curbing Tax Avoidance with a Robust GAAR

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300 *France: Corporate – Tax Administration*, PWC: WORLDWIDE TAX. SUMMARIES (Mar 18, 2024), https://taxsummaries.pwc.com/france/corporate/tax-administration.
301 *Id.*
302 *France Country Profile,* KPMG: EU TAX CENTRE (June 2020), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2020/10/france-country-profile-2020.pdf. French law also allows taxpayers to ask tax authorities where a particular activity is covered by the GAAR. If the government fails to respond in a limited time, that is equivalent to a permit that binds the tax authorities. *See France Issues New Guidelines for GAAR*, REGFOLLOWER (Jul. 15, 2019), https://regfollower.com/france-issues-new-guidelines-for-gaar/; s*ee also* Ariane Calloud, Eric Meier, Regis Torlet, Mathieu Valeteau, *Tax Controversy 2024: France*, CHAMBERS & PTRS. (May 16, 2024), https://practiceguides.chambers.com/practice-guides/tax-controversy-2024/france.
303 Ken Devos & Marco Greggi, *A Comparison of Common law and Civil law GAARs: The Cases of Australia and Italy*, 2016 INT'L TAX L. REV. 1, 19.
304 *Id.*
305 *Id.* at 21.
306 *Id.*
307 *Id.* at 23-24.
308 *Id.* at 27-28.
309 *Id.*

Although GAARs are generally helpful in curbing tax avoidant practices, not all GAARs are created equally. Some GAARs accomplish more than others.[310] There are a number of characteristics that should be embedded in, or reinforcing of, a GAAR to make it optimally effective in thwarting MNC tax avoidance strategies.

First, a GAAR is only as strong as the tax authorities that are willing to use it. The taxing authority must have both the resources and willingness to enforce the GAAR against suspicious transactions. MNCs can readily deploy lobbyists who can dilute or even neutralize efforts to establish fair tax regulation.[311] Governments must be empowered to resist such lobbying to prevent further degradation of their tax law systems.[312] If governments cannot stand up to pressure from MNCs to establish just tax policies, the presence of a GAAR will have little meaningful effect.

Second, challenging aggressive tax avoidance schemes is a complex and time-consuming task. Unlike more visible types of misconduct, it requires a high level of expertise to both decipher the avoidant transactions of MNCs, and challenge them successfully in court. Not every government will have sufficient reserves of expertise to stop wayward taxpayers, and establish the perceived deterrent effect that strengthens a GAAR's influence on taxpayer behavior.[313] Tax authorities must have sufficient knowledge of the latest mechanisms of tax avoidance to enforce the GAAR effectively against MNCs.[314]

Third, courts play an important role in ensuring tax avoidance is prevented. Courts must have the resources and willpower to interpret a GAAR's prohibitions so that they have a real effect. If a well-resourced company can delay the proceedings against it, this could encourage a favorable settlement from a tax authority strapped with limited enforcement resources. Also, a judiciary that overreacts to the general nature of a GAAR by significantly limiting the scope of its application could render the GAAR largely ineffective even if enacted with the intent to be applied broadly and vigorously.[315] A GAAR that is interpreted in this restrictive fashion by an overcautious court may be even less effective than having no GAAR at all.

Fourth, legislatures must situate a GAAR as one of a suite of mutually reinforcing tools that deter tax avoidance.[316] SAARs tailored to stop a particular transaction, while not comprehensive

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[310] Cassidy, *supra* note 262, at 63 (comparing two GAARs and finding one to be robust and the other to be a "narrow uncertain excuse for a GAAR").

[311] Mazerov, *supra* note 18; see also Wolmet Barendregt et al., *Defund Big Tech, Refund Community*, TECH OTHERWISE (Feb. 5, 2021), https://techotherwise.pubpub.org/pub/dakcci1r/release/3.

[312] John Christensen, Pete Coleman, & Sony Kapoor, *Tax Avoidance, Tax Competition and Globalisation: Making Tax Justice a Focus for Global Activism*, GLOBAL TAX WORKSHOP, FINLAND (Oct. 28, 2004), https://www.researchgate.net/publication/237424665_Tax_Avoidance_Tax_Competition_and_Globalisation_making_tax_justice_a_focus_for_global_activismi.

[313] Imma Mosquera Valderrama et al., *Tools Used by Countries to Counteract Aggressive Tax Planning in Light of Transparency*, 46 INTERTAX 140, 147 (2018) (citing the tax authorities of Colombia as an example).

[314] *See id.*

[315] Benjamin T. Kujinga, *Factors that Limit the Efficacy of General Anti Avoidance Rules in Income Tax Legislation: Lessons from South Africa, Australia, and Canada,* 47 COMP. & INT'L L.J. SOUTHERN AFRICA 429, 451-55 (2014).

[316] João Dácio Rolim, *Is There Any International Fundamental Right Against an International General Anti-avoidance Rule?*, *in* ETHICS AND TAXATION 295, 300 (R.F. van Brederode eds., 2020) (remarking that "a GAAR

on their own, can alleviate the pressure on a GAAR to be an all-encompassing enforcement mechanism. For example, strict transfer pricing rules, which state that the transaction price between related parties should be comparable to equivalent third-party transactions, should be specifically embedded in tax law even with a GAAR already in place.[317] GAARs should be tools of last resort, leaving prohibition of more familiar tax avoidance schemes to SAAR mechanisms.[318] This enables SAARs to be a useful deterrent without becoming so broad that they become "out of control," leaving the GAAR to capture unusual schemes that the SAAR might miss.[319] This optimally requires SAARs and GAARs to be coordinated to prevent overlapping and unfair application.[320]

Finally, a GAAR must properly allocate the burden of proof in order to discourage tax aggressive behavior. A GAAR that imposes an unreasonably onerous burden of proof on the government to prove a scheme is tax avoidant impairs its own effectiveness.[321] Instead, an optimally effective GAAR places the burden of proving that a transaction constitutes legitimate tax planning on the taxpayer.[322] An MNC that structured the avoidant transaction is the party that understands the transaction best. Thus, the MNC would absorb the transaction cost of proof more efficiently than the government, which would only become involved after the transaction occurred. Placing the burden of proof on the government, as some GAARs do, effectively limits the potential application of the GAAR and discourages enforcement by the taxing authority.[323] Shifting the burden of proof also reduces the temptation of courts uncomfortable with a broad statute like a GAAR to apply it only in obvious cases of avoidant behavior, rather than in novel situations that a broad provision like the GAAR was designed to prevent.[324]

E. Reinforcing the GAAR: Using New Zealand's GAAR as an Exemplar of Drafting and Judicial Interpretation

Although GAARs serve similar functions, the strength of a GAAR to curb MNC tax avoidant practices varies from jurisdiction to jurisdiction.[325] Some jurisdictions evolved from a relatively weak anti-avoidance system, to a GAAR with more influence. Others employ a GAAR that has

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functioning as a principle could be coupled with rules, such as specific anti-avoidance rules, to increase the effectiveness and fairness in combating tax avoidance.").

[317] Åsa Johansson, Øystein Bieltvedt Skeie, & Stéphane Sorbe, *Anti-Avoidance Rules Against International Tax Planning: A Classification* 7 (OECD Econ. Dep't, Working Paper, Paper No. 1356, 2016).

[318] Robert B. Whait, Gerald E. Whittenburg, & Ira Horowitz, *The World According to GAAR*, 27 AUS. TAX. F. 773, 805-06 (2012).

[319] *Id.* at 806.

[320] *See* Loutinsky, *supra* note 227, at 87 (noting that a GAAR and SAAR can override one another under certain circumstances).

[321] Orly Sulami, *Tax Abuse—Lessons from Abroad*, 65 SMU L. REV. 551, 577 (2012).

[322] *Id.* at 577-78.

[323] *Id.* at 578.

[324] *Id.* at 555-56.

[325] *See, e.g.*, Cassidy, *supra* note 262, at 62-63 (highlighting the "stark contrast" between the New Zealand and United Kingdom GAARs). The author also concludes that the failure to implement a sufficiently robust GAAR, and its subsequent failure to address tax avoidance, "attacks every aspect of a fair, and thus sustainable, taxation system. *Id.* at 63.

limited impact on tax avoidant transactions. The manuscript proposes that New Zealand's GAAR serve as a model that can be used by governments to deter MNC tax avoidant behavior.

New Zealand's GAAR is the oldest rule of its kind in the world.[326] Enacted in 1878, it was designed to prohibit landlords from shifting their tax responsibilities to their tenants.[327] For much of its history, the rule remained relatively unchanged. The result was that the rule, primarily designed for property transactions and enacted a year before the invention of the incandescent light bulb,[328] was ill prepared to handle sophisticated modern tax transactions. As a judge remarked almost a century after its enactment, the law was a "rusty instrument which . . . is no longer capable of repair" and was unsurprised that it "lacks clarity of purpose and may indeed largely fail of effect."[329]

The most recent invocation of the GAAR, arising from the passage of New Zealand's Income Tax Act 2007,[330] strengthened the law. The Act voids a "tax avoidance arrangement" for income tax purposes.[331] Tax avoidance includes indirect or direct alteration of income tax, relieving a person from liability to pay income tax or avoiding, postponing, or reducing income tax liability to pay a potential or prospective future tax liability.[332] A tax avoidance arrangement is an arrangement that "has tax avoidance as its purpose or effect; or has tax avoidance as 1 of its purposes or effects . . . if the tax avoidance purpose or effect is not merely incidental."[333] The statute places the burden of proof not on the government to prove the arrangement was impermissible avoidance, but on the taxpayer to show that the tax arrangement was permissible under the Act.[334]

While the language articulates clear statutory commands, it requires interpretation of the judiciary to either give the statute real power or narrowly interpret the statute into disutility. The

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[326] Craig Elliffe, *Policy Forum: New Zealand's General Anti-Avoidance Rule—A Triumph of Flexibility Over Certainty*, 62 CAN. TAX. J. 147, 147 (2014).
[327] *Id.* at 148 n.3.
[328] *See* Dep't of Energy, The History of the Light Bulb, ENERGY.GOV (Nov. 22, 2013), https://www.energy.gov/articles/history-light-bulb.
[329] Mangin v. Commissioner of Inland Revenue, [1971] NZLR 591 (PC) at [57], (N.Z.). For a summary of New Zealand's more recent case law, *see* Craig Elliffe, *Designing a Powerful General Anti-Avoidance Rule: Reflections on the New Zealand Experience*, BRIT. TAX. REV. 704, 711 (2023) (summarizing New Zealand's 1986 to 2008 case law on GAARs as incoherent and indeterminate).
[330] *See Income Tax Act 2007*, NEW ZEALAND LEG., https://www.legislation.govt.nz/act/public/2007/0097/latest/DLM1512301.html (last visited October 31, 2024) (hereinafter *Income Tax Act 2007*).
[331] Income Tax Act 2007, s. BG 1(1) (N.Z.)
[332] Income Tax Act 2007, pt. Y, s. YA 1 (N.Z.) The Act states in pertinent part:

> tax avoidance includes—
> (a) directly or indirectly altering the incidence of any income tax:
> (b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax:
> (c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax

Id.
[333] *Id.*
[334] Tax Administration Act 1994, s 149A (N.Z.). *See also* Cassidy, *supra* note 262, at 58.

New Zealand Supreme Court unambiguously chose the former over the latter in the 2008 case, *Ben Nevis Forestry Ventures Ltd v. Commissioner of Inland Revenue*.[335] In *Ben Nevis,* the taxpayers concocted an arrangement whereby they purchased a license to grow sell Douglas Fir trees over a fifty-year period, paid for by an inflated license and an outlandishly large (nearly $1 billion) insurance premium.[336] The resulting effect was, through a series of superfluous transactions, that the taxpayers would have been able to have millions of dollars the taxpayer's other income tax exempt every year for the next fifty years.[337] Under the arrangement, it was highly likely that the taxpayer would receive the benefits of the deduction without incurring the actual expenditure.[338] This was a blatant attempt at tax avoidance through a scheme that held obviously no commercial substance, perhaps resulting in the New Zealand Supreme Court justices sending an unambiguous message about flagrant avoidance practices.

The language of the Income Tax Act 2007 is broad, and the Court first explained that not every arrangement that reduced an entity's tax burden is necessarily tax avoidance. The Court first affirmed that arrangements that grant a tax advantage are permissible if they fall within in the statute's ordinary meaning.[339] The Court also stated that the purpose of the tax avoidance provision was to prevent uses outside the intended scope of the Act and applies to any tax avoidance that has more than an incidental purpose or effect of tax avoidance.[340] This perspective gives New Zealand's GAAR a flexible and purpose driven perspective, enabling future courts to not unduly hamstring themselves over technicalities of form when determining if a transaction is allowable or not. Instead, courts can look to the legislative intent to derive the meaning of the

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[335] [2008] NZSC 115, [2009] 2 NZLR 289 (N.Z.). The court was interpreting a tax avoidance statute under the earlier Income Tax Act 1994, and not the Income Tax Act 2007 mentioned here. However, even through various repeals and replacements, the relevant language remained the same. *See* Littlewood, *supra* note 290, at 36 n.2.
[336] Ben Nevis Forestry Ventures Ltd. v. Comm'r of Inland Revenue, [2008] NSZC 115, [2009] 2 NZLR 289 at [14]-[24] (N.Z.). *See also* Littlewood, *supra* note 290, at 51.
[337] As one writer thoughtfully summarized:

> In 1997, a company called Trinity 3 Ltd purchased a block of land in Southland. It granted the taxpayers (politely referred to by the Court as "investors") a licence to occupy this land for 50 years and to grow a forest of fir trees on it. In exchange for the licence, the taxpayers agreed to pay Trinity 3 licence fees of about $24,000 per year and a premium of $992 million. The premium was payable in 2048, by which time the trees would have matured. The idea was that the taxpayers would fell the trees and sell the timber, and the proceeds of sale would cover the premium. The taxpayers purported to discharge their liability for the premium immediately in 1997, by issuing Trinity 3 a promissory note for $992 million (apparently redeemable in 2048). They then claimed (a) to deduct the licence fees of $24,000 per year and (b) to write off the premium over the 50-year term of the licence – that is, at $19,844,000 per year. In other words, their out-of-pocket expenditure would be $24,000 per year, and they would get deductions of $19,868,000 ($19,844,000 + $24,000) per year.

Littlewood, *supra* note 290, at 51.
[338] Ben Nevis Forestry Ventures Ltd v. Commissioner of Inland Revenue, [2008] NZSC 115, [2009] 2 NZLR 289 at [127] (N.Z.).
[339] *Ben Nevis*, 2 NZLR 289 at [106].
[340] *Id.*

GAAR.[341] The artificiality of the transaction drives the evaluation of its legitimacy for tax purposes, and not solely formal compliances with prerequisites in the statute.[342]

The Act drives significant power from its low threshold level of avoidance to trigger application of the statute. All that the statute requires is that the "tax avoidance purpose or effect is not merely incidental" for statute to apply.[343] *Ben Nevis* reinforces this point by stating that the provision "is designed to avoid the fiscal effect of tax avoidance arrangements having a more than merely incidental purpose or effect of tax avoidance."[344] This is a sharp and important contrast to other GAARs such as Australia's, which requires that tax avoidance be the sole or dominant purpose of the transaction, and the UK's, which requires that tax avoidance be one of the main purposes of the tax arrangement.[345] The low threshold gives New Zealand's GAAR flexibility in identifying and rooting out tax avoidant conduct even when it is embedded in otherwise legitimate transactions.

In addition, the Court uses the language of "purpose or effect" of a transaction to determine whether tax avoidance is present.[346] This ensures that a taxpayer will not be able to circumvent scrutiny by claiming that tax avoidance was not their intentioned goal. In addition, the Court suggests that a transaction will be considered tax avoidant if it is used to reduce tax liability on other sources of income.[347] This is not a universally accepted principle of tax avoidance, and the Court's interpretation of tax avoidance in this fashion gives further strength to the underlying GAAR.[348]

The *Ben Nevis* Court also spoke to what it considered to be a "central issue" in GAARs, and also likely a central issue in GAARs generally: the relationship between the specific anti-avoidance provision and the broader underlying statutory tax framework which allows a variety of deductions and deprecations.[349] This is a potentially significant problem because a GAAR that is interpreted as overriding the underlying tax laws will suppress the intent of the legislature.[350] Conversely, a GAAR that is subsumed by underlying tax laws will have little practical effect on stopping tax avoidance.[351] In addition, an untethered GAAR could be abused by taxpayers to avoid tax through weaknesses in other area of tax law as well as by tax authorities who could

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[341] *Id.* at [114]. The court noted that "It will rarely be the case that the use of a specific provision in a manner which is outside parliamentary contemplation could result in the tax avoidance purpose or effect of the arrangement being merely incidental." *Id.*
[342] Cassidy, *supra* note 262, at 57.
[343] Income Tax Act 2007, Part Y, sec. YA1 (N.Z.).
[344] *Ben Nevis*, 2 NZLR 289 at [106].
[345] *See* John Gaetano Tretola, *Trending Towards Convergence*, 15 J. AUSTRALASIAN TAX TEACHERS ASSOC. 40, 49 (2020). *See also* Australian Taxation Office, A Strong Domestic Tax Regime: How Australia's Laws and Rule Strengthen Our Domestic Tax Regime for Large Groups (Nov. 8, 2002), https://www.ato.gov.au/about-ato/learn-about-tax-and-the-ato/tax-and-corporate-australia/a-strong-domestic-tax-regime. *See also* Finance Act 2013 c. 29, § 207(1), (U.K.) ("Arrangements are 'tax arrangements' if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.").
[346] *See, e.g., Ben Nevis,* 2 NZLR 289 at [113-14].
[347] Littlewood, *supra* note 290, at 56 (suggesting this interpretation).
[348] *Id.*
[349] *Ben Nevis,* 2 NZLR 289 at [12].
[350] Littlewood, *supra* note 290, at 56.
[351] *Id.* at 56-57.

leverage the GAAR to impose liability beyond what the underlying tax code would anticipate.[352] The Court wisely concluded that the GAAR and surrounding tax laws work most effectively in tandem, and "[e]ach provides a context with assists in determining the meaning and, in particular, the scope of the other. Neither should be regarded as overriding. Rather they work together."[353] The *Ben Nevis* decision continues to govern in New Zealand, in spite of numerous collateral attacks by taxpayers to weaken its application.[354]

Like any tax avoidance regime, the New Zealand GAAR is not a complete panacea for deterring the avoidant conduct of MNCs. For example, its provisions lack elevated sanctions against those determined to be serial tax avoiders like those contained in the UK's tax law.[355] This would be an important mechanism in discouraging MNCs who have already shown a repeated willingness to take extreme measures to avoid as much taxation as possible. However, the New Zealand GAAR, both as a whole and its individual parts, present a viable model for reinforcing effective taxation and presenting an important safety net for capturing complex and aggressive avoidant transactions that would otherwise slip through the mandates of an underlying statutory framework.

Furthermore, the judicial interpretation of New Zealand's GAAR also serves as a useful model. It avoids a fixation on technicalities, gives context and coordinated meaning to the GAAR and related statutes, and looks to the general intent of the legislature of stopping tax avoidance for guidance when necessary. *Ben Nevis* continues to be an influential case under New Zealand law, and tax avoidance continues to be evaluated under this framework today.[356] A GAAR constructed to withstand the inevitable and vigorous challenges by tax avoiding multinationals deserves no less,[357] and is an important component for any tax regime that is serious about preventing aggressive avoidance of legitimate and democratically created tax obligations.

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[352] Krever, *supra* note 279, at 12.
[353] *Ben Nevis,* 2 NZLR 289 at [103]. The court further explained:

> The presence in the New Zealand legislation of a general anti-avoidance provision suggests that our Parliament meant it to be the principal vehicle by means of which tax avoidance is addressed. The general anti-avoidance regime is designed for that purpose, whereas individual specific provisions have a focus which is primarily by their ordinary meaning, as established through their text in the light of their specific purpose. In short, the purpose of specific provisions must be distinguished from that of the general anti-avoidance provision.

Id (footnote omitted).
[354] *See* Finn Lowery, *Scrambling to Undo Tax Avoidance: The Collateral Litigation in* Ben Nevis, 26 NEW ZEALAND UNIV. L. REV. 819 (2015) (chronicling a series of collateral attacks over a twelve-year period by taxpayers against a robust interpretation of a GAAR by a reviewing court).
[355] *See infra* Part III.F.
[356] *See* Inland Revenue Interpretation Statement, Tax Avoidance and the Interpretation of the General Anti-Avoidance Provisions Sections BG 1 and GA 1 of the Income Tax Act 2007, IS 23/01 (Feb. 3, 2023), https://www.taxtechnical.ird.govt.nz/-/media/project/ir/tt/pdfs/interpretation-statements/2023/is-23-01.pdf.
[357] *See supra* text accompanying note 354 (describing the collateral attacks by taxpayers against the New Zealand statute and rulings).

F. Enhancing GAARs through Carrots and Sticks: Augmenting Penalties and Encouraging Collaboration

In addition to the aforementioned proposals, and the exemplar of the New Zealand statute, GAARs can be further strengthened with a suite of reinforcing incentives. As a positive incentive, GAARs can encourage and reward a taxpayer's good faith collaboration with the taxing authority to prevent future disagreements over controversial schemes. Conversely, GAARs can introduce special deterrents to discourage the most unrepentant of tax avoiders, including MNCs.

Taxing authorities can encourage good faith compliance though collaboration. Taxpayers considering novel and tax-significant transactions can inquire with the government authority about the legitimacy of the transaction before the transaction is executed. For example, the Internal Revenue Service once introduced a pilot program through which large business taxpayers can request examination and resolution of specific issues that are likely to be disputed during post-filing audits.[358] The goal was to reduce the cost and delays that a taxpayer might encounter during post-filing examinations.[359] Analogous to a no-action letter offered by the United States Securities and Exchange Commission regarding the legality of proposed securities transactions,[360] this would reduce the enforcement costs of the government through a more expedient and less-adversarial mechanism than a legal dispute. This also offers more certainty to the taxpayer who can address transactions beforehand and reduce their risk of a post-transaction legal challenge.

Such a mechanism could also filter out the good faith actor from the willful tax aggressor. The firm that genuinely wants to exemplify bot the letter and spirit of tax law would be more willing to submit a proposed transaction for review. The firm that uses transactions primarily for evasive purposes would benefit little from a no-action letter and skip the process altogether, relying on factors such as political influence and an aggressive defense to let a questionable transaction remain in place. Skipping this process could also influence the procedure for how tax disputes are handled. Just as an entity's failure to exhaust administrative remedies can influence the outcome of a subsequent legal proceeding, so could a taxpayer's selection to skip the transaction review process alter the scrutiny by the taxing authority pursuing a post-transaction audit.

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[358] Notice 2000-12, Introduction of Pilot Program 1 (n.d.) [hereinafter Tax Notice], https://www.irs.gov/pub/irs-drop/n-00-12.pdf. *See also IRS Pilots Pre-Filing Agreement Program*, TAX NOTES (Feb. 11, 2000), https://www.taxnotes.com/research/federal/irs-guidance/internal-revenue-bulletin/irs-pilots-pre-filing-agreement-program/10slv. The IRS announced another, similar initiative in 2005. *See* IRS Announcement 2005-87, 2005-2 C.B. 1144 (Dec. 12, 2005) (announcing an early issue resolution program between the IRS and taxpayers).

[359] *See* Tax Notice, *supra* note 358, at 1.

[360] *See, e.g.,* Maryland Sec. Comm'r v. U.S. Sec. Corp, 716 A.2d 290, 295 n.4 (Md. App. 1998) (defining a no-action letter as "A letter usually written by an attorney for a governmental agency (e.g. SEC) to the effect that, if the facts are as represented in a preceding request for a ruling, he will advise the agency not to take action because the facts do not warrant it."). *See also* Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and Proposed Framework,* 83 CORNELL L. REV. 921, 937-46 (1988) (summarizing how no-action letters work).

GAARs can also be more effective through the introduction of certainty enhancing measures.[361] Organizations generally desire certainty in tax laws that require their compliance.[362] The taxpayers most worried about uncertainty are typically those who place the highest priority on following tax laws properly.[363] Aggressive taxpayers, in contrast, will perceive vagueness as an opportunity to exploit the rules, and would choose to take a "turn of the roulette wheel of the audit casino" rather than pay more taxes up front in the first place.[364] Furthermore, such vagueness would penalize conservative taxpayers who would be more likely to overpay in order to avoid any risk of government action.[365]

One such certainty-enhancing measure is the use of an angel list. An angel list is an inventory of transactions that have been deemed by a taxing authority as unlikely to be abusive.[366] Such a list benefits honest taxpayers by informing them that utilization of certain transactions will not provoke government scrutiny. This relieves the good faith taxpayer of the burden of seeking detailed professional advice on the legality of a particular transaction and also simplifies any risk management issues that arise from the transaction. Longstanding judicial and administrative practices can be the basis for such a list, requiring little if any significant revision of current tax practices. Although a potentially certainty-improving measure for taxpayers seeking to not run afoul of a strong GAAR, angel lists are no panacea because of their potential infringement on judicial authority, at least in the United States, to determine liability under established tax laws.[367]

GAARs can also intensify penalties against chronic rule violators. Under a standard system, relatively weak penalties from tax avoidance may not be sufficient to deter well-funded and highly motived taxpayers like MNCs from engaging in tax avoidant behavior. For those companies, risk from aggressive tax avoidance may be perceived as just a nuisance cost of doing business, with little concern for the externalities or other consequences of tax avoidant practices.[368] This can be countered by amplifying the penalties against the most habitual offenders.

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361 Hans Gribnau, *Legal Certainty: A Matter of Principle, in* RETROACTIVITY OF TAX LEGISLATION 69, 69 (Hans Gribnau & Melvin Pauwels eds., 2013) (explaining in the tax context that "[p]eople value legal certainty. Predictability of law protects those subject to the law from arbitrary state interference with their lives.").

362 *See, e.g.,* Chris Evans, *Yearning for Earnout Certainty,* 11 TAX SPECIALIST 294, 305 (2008).

363 *See* Emily Cauble, *Safe Harbors in Tax Law*, 47 CONN. L. REV. 1385, 1407 (2015).

364 Richard J. Kovach, *Bright Lines, Facts and Circumstances Tests, and Complexity in Federal Taxation*, 46 SYRACUSE L. REV. 1287, 1303 (1996).

365 *Id* (explaining that "[r]isk aversion can produce unnecessarily conservative determinations by practitioners.").

366 Megan L. Brackney, *Reporting Loss Transactions: Too Much of a Good Thing*, 59 N.Y.L. SCH. L. REV. 317, 323 (2014-15); Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1633-34, 1660 (2009); Alex Raskolnikov, *Crime and Punishment in Taxation: Deficit, Deterrence, and the Self-Adjusting Penalty,* 106 COLUM. L. REV. 569, 640 (2006).

367 *See* Charlene D. Luke, *The Relevance Games: Congress's Choices for Economic Substance Gamemakers,* 66 TAX. LAW. 551, 557 (2013). There is also the possibility of tax agencies issuing a 'demon list', defined as transactions that are, according to the taxing authority, per se violative of the relevant tax rules. *Id.* at 607-08. Such a list may also be subject to the same limitations as an equivalent angel list. *Id.*

368 *See* Jay A. Soled, *Third-Party Civil Tax Penalties and Professional Standards,* 2004 WISC. L. REV. 1611, 1633-34 (highlighting example of low tax penalties causing tax shelter promoters to perceive legal liability "as a mere cost of doing business). *See also* Chaffee & Davis-Nozemack, *supra* note 144, at 1437-40.

One solution is to incorporate a 'GAAR-plus' enforcement mechanism into general anti-avoidance statutes.[369] This elevated GAAR regime would contain a monetary threshold below which taxpayers would be exempted from its terms. [370] This would enable the taxing authority to focus on major tax avoiders.[371] However, if tax avoiders begin to structure their transactions to skirt under the monetary threshold, that tax avoider would still be punished under the enhanced system if the tax avoider has been already been sanctioned in the past.[372]

The power of the GAAR-plus lies in how penalties are administered. Chronic offenders would be subject to a scale of punishment analogous to clear and incremental levels of section found in the Federal Sentencing Guidelines.[373] Punishment would be determined according to a points system that would consider factors such as the magnitude of the avoidant behavior or the taxpayer's prior avoidant conduct.[374] The most egregious tax offenders would be subject to the highest penalties. Punishment could also be reduced for appropriate remediation or rehabilitation by the taxpayer as determined by the taxing authority.[375]

Perhaps the most comprehensive and promising initiative that can be implemented in support of a GAAR is the UK's Serial Avoidance Tax Regime (STAR). During the early 2010s, the UK government had become increasingly engaged in preventing tax evasion and tax avoidance.[376] Policies included increasing levels of voluntary disclosure, more aggressive prosecutions of lawbreakers, and establishing standards that prevented global tax avoidance by individuals and MNCs.[377] In apparent recognition that a select group of particularly aggressive tax avoiders were repeatedly and flagrantly avoiding taxes, the UK enacted the STAR as a part of the 2016 UK Finance Act.[378]

The STAR is designed to target taxpayers who repeatedly circumvent legitimate tax laws. The STAR provisions are triggered when certain types of transactions are 'defeated' by the UK tax authorities.[379] Transactions are considered to be defeated when the government has adjusted a taxpayer's tax position to remove a tax advantage, the taxpayer has adjusted their own tax position, the taxpayer entered into a settlement with the government, or a tribunal or court

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[369] Loutinsky, *supra* note 227, at 113.
[370] *Id.* at 113-14.
[371] *Id.*
[372] *Id.* at 114.
[373] *Id.* at 114-16.
[374] *Id.* at 115
[375] *Id.* at 118-19.
[376] *2010 to 2015 Government Policy: Tax Evasion and Avoidance*, HM REVENUE & CUSTOMS (May 8, 2015), https://www.gov.uk/government/publications/2010-to-2015-government-policy-tax-evasion-and-avoidance/2010-to-2015-government-policy-tax-evasion-and-avoidance.
[377] *Id.*
[378] *See also* UK Finance Act 2016 ch. 24, sch. 18 (UK), https://www.legislation.gov.uk/ukpga/2016/24/schedule/18 (last visited Nov. 14, 2024).
[379] Tracey Bowler, *The Implications of Recent Additions to HMRC Powers and the Shifting Balance in the Relationship with Taxpayers* 30 (Inst. Fiscal Stud., TLRC Disc. Paper No. 13, Nov. 2017), *available at* https://ifs.org.uk/sites/default/files/output_url_files/TLRC_DP_13.pdf. *See also* HM Revenue & Customs, Serial Tax Avoidance Regime – General Information CC/FS38a 1 (2021) (listing, https://assets.publishing.service.gov.uk/media/601169acd3bf7f05bf0bebf9/CC-FS38a-01-21.pdf. [hereinafter STAR: GENERAL INFORMATION]

adjusted a taxpayer's tax position in order to remove a tax advantage.[380] The taxpayer then receives a notice that they are now governed by the STAR for a five year warning period.[381] During that time, the taxpayer must provide additional written notices each reporting period about certain arrangements that have been used to achieve a tax advantage.[382] What is notable about this structure is that, despite the term 'serial' in the name of the initiative, a single transaction can potentially suffice for a taxpayer to be placed under the STAR requirements.

If the government defeats another transaction during the warning period, then further sanctions may apply.[383] The government can enforce a penalty on the taxpayer, which is not uncommon for taxing authorities to impose.[384] If a taxpayer has not previously received a warning notice, the penalty charged is 20 percent of the counteracted advantage.[385] If the taxpayer has received one warning notice, the penalty increases to 40 percent. Two or more warning notices triggers a penalty of 60 percent of the counteracted advantage.[386] The taxpayer can also be prevented from benefitting from direct tax reliefs, such as income tax loss relief, otherwise offered during a three-year period that the warning period is active.[387]

Perhaps most intriguing for purposes of an effective GAAR is the third potential sanction that can be imposed by the government: public identification of the taxpayer as a serial tax avoider.[388] The government may publish the taxpayer's name and address, nature of business, amount of tax that the taxpayer tried to avoid, periods during which avoidance arrangements were used, and, as a catch all, "any other details we think are necessary to clearly identify you."[389] This gives the government substantial discretion to publicize what it wishes about the taxpayer in order to have the maximum public impact.

Naming and shaming can compel otherwise recalcitrant companies to respond.[390] Vodafone UK was forced to close a London store because of a public protest against a tax avoidance scheme worth £6 billion.[391] Starbucks reluctantly paid more taxes in the UK in response to boycott efforts on social media targeting its tax avoidance practices.[392] Shaming tax avoiders is most

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[380] STAR: GENERAL INFORMATION, *supra* note 379, at 5.
[381] *Id.* at 1-2.
[382] *Id.* at 2. A tax advantage is typically defined as "the difference between the amount of tax that would be payable with and without the use of the tax avoidance arrangements." *Id.* at 2.
[383] *Id.*
[384] *Id.*
[385] *Id.* at 3.
[386] *Id.*
[387] DIXON WILSON, SERIAL AVOIDANCE TAX REGIME (2017), *available at* https://www.dixonwilson.com/technical-updates/serial-tax-avoidance-regime-star.
[388] *Id.*
[389] STAR: GENERAL INFORMATION, *supra* note 379, at 3.
[390] Munisami, *supra* note 140, at 83; *see also* Sam Dastyari, *Why Companies that Avoid Tax Should be Named and Shamed*, SYDNEY MORNING HERALD (Apr. 8, 2015), https://www.smh.com.au/opinion/why-companies-that-avoid-tax-should-be-named-and-shamed-20150406-1mfi98.html. Public officials in the UK are not the only ones publicly call for naming and shaming practices. *See* David Bloom, *Tax Avoidance – A View From the Dark Side*, 39 MELB. U. L. REV. 950, 957 (2016) (discussing calls for naming and shaming in the Australian context).
[391] Munisami, *supra* note 140, at 83.
[392] Vanessa Barford & Gerry Holt, *Google, Amazon, Starbucks: The Rise of 'Tax Shaming'*, BBC (May 21, 2013), http://www.bbc.co.uk/news/magazine-20560359. *See also* Dastyari, *supra* note 390 (noting that Starbucks decided voluntarily to pay £20 million in taxes).

effective when it is supported by blatant exposure, and as a result has a positive impact on prosocial conduct.[393] Individuals are also subject to tax avoidance-based naming and shaming.[394] Although it is not clear that shaming of well-known people always increases public outrage, such shaming of a well-known public figure can make salient to the public the problem of tax avoidance and shape attitudes against unfair tax avoidance practices.[395] This can further enhance the effectiveness of a GAAR, as companies steer clear to prevent not only the penalties associated with its outcomes but also the negative public scrutiny to follow.

Conclusion

The digital economy is influencing global commerce.[396] MNCs have discovered increasing sources of value that are not only intangible, but readily crosses national jurisdictions.[397] This creates an ideal environment for MNCs to circumvent payment of legitimate tax organizations, to the detriment to the broader societies at large who must make up the difference.

MNCs have taken tax avoidance to a new level, with some firms reporting little or no federal tax liability in the United States and other jurisdictions.[398] The modern challenge for governments is that taxing the digital arena is hard, given that jurisdictions globally continue to rely on tax regimes based on the historic brick-and-mortar economy.[399] Recently, both international and domestic jurisdictions have tried to stem the tide of tax avoidance with a novel legislative initiatives that target the digital economy; however, these efforts have resulted in glacial movement with limited success in curbing MNC's avoidant behavior.[400]

Jurisdictions can alleviate the stagnancy in effectuating a unified and updated tax framework by implementing GAARs.[401] Because of their flexibility and open-ended nature, GAARs have the ability to continually adapt to fulfill the intent of legislatures wanting to get tax avoidance under control.[402] However, not all GAARs are created equal. The scope, burden of proof, and other traits of GAARs can make a difference between a successful GAAR, and one that has limited

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[393] Stefanos A. Tsikas, *Bringing Tax Avoiders to Light: Moral Framing and Shaming in a Public Goods Experiment,* 7 BEHAV. PUB. POL'Y 557, 576 (2023) (concluding that "disclosing unwarranted behavior is an effective strategy for reducing tax avoidance and, more generally, promoting prosocial behavior. The communication of moral arguments also works (but is rather short-lived) and reinforces the shaming of tax avoiders.").

[394] *See, e.g., Celebrity Investors Named in £1.2bn Tax Avoidance Scheme*, 4 NEWS (Jul. 9, 2014), https://www.channel4.com/news/tax-avoidance-george-michael-melua-arctic-monkeys-liberty; Mábel Galaz, *Naming and Shaming the Celebrity Tax Dodgers*, EL PAÍS (May 6, 2024), https://english.elpais.com/elpais/2014/05/06/inenglish/1399378385_063821.html; Tom West, *How Famous Tax Dodgers Got Unstuck*, CRUNCH (Sep. 25, 2024) (listing seven famous individuals as part of the "tax rogue Hall of Shame").

[395] Rebecca Bramall, *A 'Powerful Weapon;? Tax, Avoidance, and the Politics of Celebrity Shaming,* 9 CELEBRITY STUD. 34, 47-48 (2018). The author notes that taxpayers may also identify with the beleaguered celebrity, thereby "promot[ing] fantasies of tax minimisation and 'efficiency'" *Id.* at 47.

[396] *See supra* Part I.A.

[397] *See id*.

[398] *See supra* Part I.C.

[399] See supra Part I.B.

[400] *See supra* Part II.A, B.

[401] *See supra* Part III.A.

[402] *See supra* Part III.B.

practical effect.[403] Similarly, how courts interpret GAARs can significantly influence how effecting a GAAR is actual practice.[404] Still, GAARs have the potential to benefit both common law and civil law jurisdictions.

A robust GAAR can help curb digital tax avoidance as countries await how best to tax earnings not tied to brick-and-mortar physical presence standards.[405] This article proposes that New Zealand's GAAR is both robust and effective. Its language is broad, its threshold for evaluating a transaction as a sham is low, and it places the burden of proof properly on the taxpayer that conceived of the transaction in the first place.[406] New Zealand's GAAR is also effectively backed by a reviewing judiciary that breathed life into its terms and used the GAAR to properly effectuate the intent of the legislature. This model can be supplemented by a suite of incentives and disincentives, including a promising regime that targets the most aggressive tax avoiders.[407] The overall result is a GAAR that can serve as a model for other jurisdictions that wish to stem the overwhelming tide of tax avoidant transactions of MNCs in an increasingly digital economy.

[403] *See id*.
[404] *See id*.
[405] *See supra* Part III.D.
[406] *See supra* Part III.E.
[407] *See supra* Part III.F.

Exhibit A
Sample General Anti-Avoidance Rule[408]

(1) This section applies when the Tax Authority is satisfied that:
(a) a scheme has been entered into or carried out;
(b) a person has obtained a tax benefit in connection with the scheme; and
(c) having regard to the substance of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit.

(2) Despite anything in this Act, when this section applies, the Tax Authority may determine the tax liability of the person who obtained the tax benefit as if the scheme had not been entered into or carried out, or as if a reasonable alternative to entering into or carrying out the scheme would have instead been entered into or carried out, and can make compensating adjustments to the tax liability of any other person affected by the scheme.

(3) If a determination or adjustment is made under this section, the Tax Authority must issue an assessment giving effect to the determination or adjustment.

(4) An assessment under subsection (3) must be served within 5 years from the last day of the tax year to which the determination or adjustment relates.

(5) In this section:
"scheme" includes any course of action, agreement, arrangement, understanding, promise, plan, proposal, or undertaking, whether express or implied and whether or not enforceable;
"tax benefit" means:
(a) a reduction in a liability to pay tax, including on account of a deduction, credit, offset or rebate;
(b) a postponement of a liability to pay tax;
(c) any other advantage arising because of a delay in payment of tax; or
(d) anything that causes:
(i) an amount of gross revenue to be exempt income or otherwise not subject to tax; or
(ii) an amount that would otherwise be subject to tax not to be taxed.

[408] This sample GAAR is originally presented in Waerzeggers & Hillier, *supra* note 229, at 10.