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Recommended Citation
Sara Dillon, Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation, 50 Int'l L. 275 (2017)
https://scholar.smu.edu/til/vol50/iss2/4

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Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation

SARA DILLON*

I. Corporations, States and Global Revenue Starvation

A. THE CONTEXT FOR CORPORATE TAX AVOIDANCE AND NATIONAL AUSTERITY PROGRAMS

There can be no doubt about the fact that wealthy individuals and large corporations are feverishly, and routinely, engaged in an “offshore” quest to avoid the obligation to pay national taxes.1 An entire industry has grown up to serve this desire to avoid paying taxes.2 The fears of a suspicious global public have been confirmed by the “LuxLeaks” and the Panama Papers, two contrasting but related windows on the elaborate devices whereby large corporations and wealthy individuals hide their assets and avoid the payment of taxes.3 It should be noted, however, that these disclosures only confirmed

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2. See Stephen Long, Corporate Tax Minimization Costs Government $US1 Trillion Says Accounting Insider, SHANGHAI DAILY (July 11, 2016, 2:56 PM), http://www.shanghaidaily.com/AustraliaPlus/Corporate-tax-minimisation-costs-governments-US1-trillion-says-insider/shdaily.shtml (quoting international accounting expert George Rozvany, as saying that the major accounting firms are “masterminds of international tax avoidance” and must be broken up into smaller companies). Rozvany also notes that these firms work with national governments to deliver results for the largest corporations. Id.

what was already well understood: Tax avoidance by large corporations is well-established, standard practice, and the global public has waited in vain for effective steps to be taken to bring it to an end. The fact of tax evasion is old news; the lack of adequate regulatory action is the story of interest.

Tax avoidance is accomplished through the manipulative attribution or allocation of corporate profits to a low or no tax jurisdiction, instead of the higher tax jurisdiction to which—under a more rigorously accurate regime—these profits “should” rightly be attributed. In this sense, corporations and their tax accountants have been permitted to draw and redraw geographical boundaries in order to shield more corporate profit from the tax collector. While the mechanisms of profit allocation are complex, proper and more accurate allocation is both possible and achievable. What prevents a reorientation of corporate profits is not the daunting complexity of the problem, but the discretion granted by governments to corporations—implicitly or explicitly—to determine their own tax obligations through the operation of geographical fictions.4

For wealthy individuals and large corporations, the payment of full or even reasonable taxes has become a relic of the past. Globalization and automation have together facilitated tax avoidance strategies of the most audacious kind.5 While wealthy individuals are as keen to avoid taxes as multinational corporations, this article will focus on corporations in particular, and the degree to which the very idea of a mandatory corporate obligation to contribute to the public good has disappeared. Thus, the important question is not how corporations are achieving radical tax avoidance (the devices and mechanisms have been fully described elsewhere), nor why they are (obvious to all), but rather why governments have taken so few effective steps to stop these practices.6 A striking fact is that knowledge

4. Michael Motala, The New Global Politics of Sovereign International Tax: Space, Time and Why BEPS Is Not the Final Frontier, ACADEMIA (2016), https://www.academia.edu/23971258/The_New_Global_Politics_of_sovereign_international_tax_space_time_and_why_BEPS_is_not_the_final_frontier (describing the recent shift in thinking about multinational corporations and their relationship to particular nations for purposes of assessing tax liability. Also, noting that “the spatial concept of the sovereign state has led to the legal deconstruction of MNEs into fictive national units, facilitating tax arbitrage and avoidance through intra-party exchange that is real and virtual”).

5. See Wolfgang Schauble, Here’s the Fix to International Chaos: A Global Tax System, WASH. POST (Nov. 3, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/03/outdated-tax-policies-are-hurting-nations-budgets-we-need-a-global-approach-to-corporate-taxation/ (noting that due to the growing pace and intensity of globalization and digitization, international businesses have adapted their structures to work around outmoded tax laws, and that existing tax-allocation laws date back a hundred years).

alone has not led to the creation of remedies. Since national governments have shown themselves to be reluctant to police such tax avoiding behavior, unenforceable “information sharing” programs, automatic or otherwise, may not have any appreciable effect.7

Many studies on the subject of tax avoidance have parsed the details of corporate tax behavior so minutely that the fact of governmental non-response has often been passed over. Reasonable people might differ as to what categories of corporate profit should be included for taxation purposes within any given jurisdiction. But the overarching, pervasive problem is that we now have a culture of tax avoidance under which corporate tax lawyers and tax planners simply choose a method of tax avoidance to suit themselves, familiarly known as “aggressive tax planning.”8 Whether the U.S. public loses out today and the Nigerian, Russian or Argentine public loses out tomorrow, all global citizens are losing out in the most fundamental way when it comes to necessary public investments.9 It is not surprising that a new term has arisen to indicate the low and/or no-tax phenomenon: “tax abuse.”10


8. Aggressive tax planning is a term used by the OECD to indicate devices used by tax planners to save large amounts of otherwise payable tax. See Peter Bickers, Tracey Lloyd, Bhaskaran Nair & Michael Slyuzberg, Inland Revenue, New Zealand, Demand for Aggressive Tax Planning, 95-112 (2013), available at https://www.irs.gov/pub/irs-soi/13rescontaxplanning.pdf. The authors note:

[a]n ATP scheme is generally understood to mean any scheme where the purpose or benefit of the scheme appears to be the reduction of taxable income or inflation of deductible expenditure, and the tax advantage sought is not clearly sanctioned by the tax laws. In other words, ATP involves those schemes that may follow the letter of the law but not its spirit.


10. The term “tax abuses” was famously used in a report by the International Bar Association in 2013. See International Bar Association, Tax Abuses, Poverty and Human Rights 1-268, 1 (Oct. 2013), available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4A0C9F930-A0D1-4784-8D09-F588DCDDFEA4. The International Bar Association questioned “why tax abuses [are] becoming so important” and suggested that this is because of “the
In virtually all contemporary societies, as has been made clear most recently by the Panama Papers revelations, corporate elites have developed elaborate global mechanisms to avoid paying taxes into public coffers. Detailed and technical discussions about the proper national "ownership" of particular tax revenues is a second-level consideration. What must first be tackled is the seemingly entrenched notion that large corporations have a right, as corporations, to avoid as much taxation as they possibly can. No degree of audacity in the behavior of corporate tax planners and no degree of public outrage seems to have had much effect in dislodging this idea. It is this conception of corporate tax impunity that needs to change—the precise scope of governmental taxing power in any given situation can be dealt with as particular situations arise.

As mentioned above, recent revelations have shown in the most dramatic way that large corporations are engaged in a radical version of tax avoidance, and despite lip service to the contrary, national governments seem equally determined to assist corporations in this quest. Many of even the largest corporations pay little or no taxes anywhere, certainly nothing like the amounts they would pay if states assessed and collected corporate taxes in a straightforward manner, based more accurately on where profits are derived. Corporate tax avoidance, reliant on what national tax laws allow, is a phenomenon with no public benefit. Such avoidance advantages only the corporations concerned. The fact that national governments have taken

immense magnitude of the issue." Id. The IBA continues, stating that "the best estimates tell us that tax abuses are the most significant illicit financial flow out of the developing world, eclipsing the amount of official development aid that is invested in those countries"). Id. at 1.

11. There are many tax havens, offering almost countless opportunities to the very wealthy and to large corporations to avoid paying legitimate taxes in jurisdictions where they reside and operate. See, e.g., Lucy Clarke-Billings, Panama Papers: Top Ten Tax Havens—Where the Money Is Hidden, NEWSWEEK (Apr. 6, 2016, 10:34 AM), http://www.newsweek.com/panama-papers-top-ten-tax-havens-where-money-hidden-444512.


[cl]itizens, watchdog groups, and even government officials are puzzled, frustrated and even outraged by the phenomenon, wondering where the nation state lost its way in regulating its people and its resources, and why it is standing by, apparently helplessly, as its tax base erodes even as fiscal turmoil drives societies toward austerity and the erosion of the welfare state.

Id. at 53.


Corporate income taxes have diminished as a major source of revenue, from 39.8 percent in 1943 to 9.9 percent in 2012. The reason is not that corporations have come to play a less important role in our economy, or that corporate profitability has diminished. Rather, it is that corporations have learned how to exploit loopholes in our tax system, have lobbied hard and successfully to increase those loopholes, and have especially taken advantage of globalization to move profits to jurisdictions that are lightly taxed.

Id. at 9.

15. See Tracy Kaye, The Offshore Shell Game: U.S. Corporate Tax Avoidance Through Profit Shifting, 18 CHAP. L. REV. 185 (2014). Tracy Kaye points out that “public perception” is beginning to catch on to the fact that the largest corporations are engaged in systematic tax avoidance and that there is a clear disconnect between where corporations do business and where they “locate” their profits for tax purposes. Id. On the other hand, the public has depended on news outlets to inform them of what politicians have apparently known for years.

16. See Richard Rubin, US Treasury’s Lew Challenges E.U. on Corporate Tax Investigations, WALL ST. J. (Feb. 11, 2016, 6:58 AM), http://www.wsj.com/articles/u-s-treasurys-lew-challenges-eu-on-corporate-tax-investigations-1455177782 (noting that Secretary Lew accuses the EU of “adopting an entirely new legal theory and applying it retroactively in a broad and sweeping manner”); see also Duncan Robinson, Jack Lew Accuses Brussels of Bias Against US Companies, FIN. TIMES (Feb. 11, 2016), https://www.ft.com/content/a12074e0-d0d6-11e5-92a1-c5e23e99c77. This perspective is especially interesting in light of the fact that certain E.U. member states have assisted U.S. companies in avoiding taxation on profits derived in many places. It would seem a more sensible approach for U.S. authorities to work with E.U. authorities—assuming that the United States is sincere in its hope of taxing its multinational companies in a fairer way. In recent days, the U.S. Senate Finance Committee has added its voice to Secretary Lew’s by opposing the European Union’s moves to recoup unfairly evaded taxes. See Letter from U.S. Senate Finance Committee, to The Hon. Jacob Lew, U.S. Secretary of the Treasury, regarding European Union Tax Enforcement (May 23, 2016), available at https://www.finance.senate.gov/imo/media/doc/Hatch,%20Wyden,%20Portman,%20Schumer%20Continue%20Push%20for%20Fairness%20in%20EU%20State%20Aid%20Investigations.pdf.


Tax avoidance is the most powerful example of corporate dominance of national economic policy. In no sense can widespread tax avoidance by corporations be a matter of indifference to the societies in which the corporations operate. Nor would paying a normal rate of corporate tax be ruinous for large corporations. When politicians talk about the supposed benefits of "tax competition," they are repeating a theory that lacks substance, perhaps to present the public with an apparently reasonable basis for inaction, implying that serving corporate needs aligns with the "national" interest.

Many reports have analyzed the issue of corporate tax avoidance from a specialist perspective. The modes and devices used by corporations and their accountants have been well explained in numerous outlets. This article will

Agreement to Close International Loopholes, THE GUARDIAN (July 19, 2013, 4:20 PM), https://www.theguardian.com/business/2013/jul/19/oecd-tax-reform-proposals-amazon, with John D. McKinnon, Inversions Require Congressional Action, Lew Says: Treasury Secretary Says More Mergers to Lower Taxes Are in the Works, WALL ST. J. (Sept. 8, 2014, 6:47 PM), http://www.wsj.com/articles/lew-imperative-for-congress-to-solve-inversions-problem-1410181113. Although the issues of corporate inversions and EU member nations' tax avoidance vehicles are not exactly the same, it makes little sense for Secretary Lew to denounce inversions as unfair tax avoidance strategies, while castigating the EU for cracking down on tax avoidance strategies by the similar multinational companies. The Obama administration has shown no comprehensive or cohesive sense of the problem and how to deal with it effectively.


Since the 1970s, with eager . . . assistance from the international private banking industry, it appears that private elites in this subgroup of 139 countries had accumulated $7.3 to $9.3 trillion of unrecorded offshore wealth in 2010, conservatively estimated, even while many of their public sectors were borrowing themselves into bankruptcy, enduring agonizing "structural adjustment," and low growth, and holding fire sales of public assets.

Id. at 5. See also Steven A. Bank, The Globalization of Corporate Tax Reform, 40 PEPP. L. REV. 1307, 1310 (2013), (noting that some commentators believe that corporate tax is now essentially "optional" for multinational corporations).

20. See e.g., Syed Kamall, Tax Competition Works for Europe, WALL ST. J. (Nov. 20, 2014, 2:27 PM), http://www.wsj.com/articles/tax-competition-works-for-europe-1416511643 (arguing that proposals to harmonize European tax rates will drag down the EU). Kamall, a member of the European Parliament, believes that tax competition drives down overall rates and encourages inward investment. Id. He does not address the problem of the many corporations that do not pay taxes anywhere, due to the elaborate avoidance mechanisms made legally available to them by corporation-friendly jurisdictions like Ireland, Luxembourg and the Netherlands. Id.

confront the problem of governments deeply reluctant to interfere with the runaway train of global tax avoidance—by wealthy individuals and in particular by multinational corporations.\textsuperscript{22} Not only have national governments lost control over the tax revenues due to them; they have also apparently lost the will to reverse course and assert the dominance of the state over corporations.\textsuperscript{23} This article will move beyond the mechanisms by which taxes are routinely avoided and evaded, to confront the political climate that sees this as the normal or at least tolerable behavior of the largest corporations. In this sense, tax avoidance is a symptom of globalization gone wrong. It is an indicator of bad governance enabled by globalization, as opposed to "immoral" corporate behavior. Sold to the public as a means to spread prosperity across the globe, globalization has instead provided cover to increasingly corporate-determined efforts to avoid contributions to the common good.

This article first discusses the fundamental nature of taxation, and why it is necessary to the successful functioning of the state. It notes that in the absence of explicit laws against tax avoidance, multinational corporations and their accountants have taken advantage of globalization and technological developments to decouple corporate profits from the jurisdictions in which these are generated. Most forms of contemporary tax avoidance are based on manipulative misallocations or misattributions of corporate profits to whatever jurisdiction offers the corporation the best possible tax "deal." Corporations no longer consider themselves bound to pay taxes to the states in which their profits are actually derived. This has led to a "new normal" where multinationals have come to consider corporate tax as "optional," and

\textsuperscript{22} Both wealthy individuals and corporations with transnational reach have increasingly availed of tax schemes that have created an environment of "tax optional" for those with access to the proper advice. See generally, Chuck Collins, The Panama Papers Expose the Hidden Wealth of the World's Super-Rich, NATION (Apr. 5, 2016), https://www.thenation.com/article/panama-papers-expose-the-hidden-wealth-of-the-worlds-super-rich/. Collins notes:

For $2,500, an individual can now purchase the "Complete Offshore Package" that includes an offshore corporation in Belize, an offshore trust in the Bahamas, and offshore bank account at the Global Bank of Commerce in Antigua, and mail forwarding for one year. After the set-up, this will only cost $1,000 a year.

in many cases not to pay any tax at all on corporate profits, and at most very little.

In this, friendly governments in all parts of the world have assisted corporations. The explosion of the “offshore” approach to corporate tax, made clear to the global public with recent revelations, is juxtaposed with the failure of governments to bring this state of affairs to an end. The article describes the recent “LuxLeaks” revelations in Europe, and the extraordinary extent to which certain EU member states have come to be identified with helping multinational corporations to avoid paying taxes. In the case of Luxembourg, the government was shown to be actively working with large companies to guarantee them low levels of taxation in the form of special agreements. Other popular tax avoidance strategies, such as the “inversions” much discussed in recent months in the United States, are also discussed.

The next section of the article discusses where fundamental reform might come from, given the anger and frustration of the global public following from revelations of corporate tax avoidance, and examines initiatives emanating from the Organisation for Economic Co-operation and Development (OECD), the European Union, and the United States. It explores the distinct but inter-related approaches taken at these different levels—international, regional and national—and considers the question of whether there exists adequate political will to confront the massive loss of government revenue attributable to corporate tax avoidance. Finally, the article highlights the recent declarations and recommendations of the “Independent Commission for the Reform of International Corporate Taxation” created through the joint action of several non-governmental organizations. The argument is made that while the Independent Commission’s recommendations are clear and resounding, it remains to be seen whether such a group can exert sufficient influence to change what has become an entrenched status quo. The article throughout notes the powerful corporate interests determined to resist attempts to realign corporate profits with the particular jurisdictions in which they are earned. It leaves open the question of whether laws at the international, regional, or national level can re-establish the obligation of corporations to contribute to the public good within those jurisdictions.

B. The Indispensable Three Letter Word

It is obvious that public goods cannot be sustained without funding. Taxation is an ancient practice, upon which the overall mechanisms of

government have been made possible. In modern times, human rights-based doctrines similarly depend upon the availability of revenue sufficient to the completion of core governmental tasks. The very idea of "human rights" is not viable without adequate public revenue streams. The tragedy of governmental capture by corporate interests is that funds are diverted from their intended purposes and put to socially wasteful uses that serve uniquely private, rather than more general needs. Theoretical rights to human development, including the right to education, are essentially meaningless in the absence of funding to bring these goals about. While political conservatives might reject any emphasis on the public or governmental role in successful socio-economic outcomes, individuals on their own lack the capacity to bring about collective goals. In modern times, it is the state that represents the principal structures of social and political organization; if any doubt the necessity of a fully functioning nation state, they only have to consider the spectacle of collapsed states, in the Middle East and elsewhere, to appreciate the state's essential role.

At many levels and across a wide geographical and subject matter range, human society is experiencing revenue starvation. Even in well-developed and resource-rich countries, one hears repeatedly that there is insufficient

functioning economies.


26. See generally Gabriel Zucman, The Hidden Wealth of Nations: The Scourge of Tax Havens (2015) (providing a general outline of the recent rise of tax havens and the overall pernicious effects). Writing in the book's foreword, Thomas Piketty writes that "[t]ax havens and their financial opacity are one of the key driving forces behind rising wealth inequality, as well as a major threat to our democratic societies." Id.


corruption often depletes resources that would otherwise go to fund access to adequate healthcare facilities, equipment, supplies and personnel as well as to the underlying determinants of good health including food, housing and safe potable water. Thus, corruption undermines the ability of governments not merely to meet their citizens' wants and needs, but rather their social and economic rights.

Id.

28. The notion of the "failed state" is often attributed to an article by Gerald B. Helman and Steven R. Ratner. See Gerald B. Helman & Steven R. Ratner, Saving Failed States, 89 Foreign Pol'y 3 (1992); see generally John Yoo, Fixing Failed States, 99 Cal. L. Rev. 95 (2011) (providing an analysis of the challenge posed to the international community by the "failed state").

29. See Yariv Brauner, What the BEPS? 16 Fla. Tax Rev. 55, 64 (2014) ("The legal framework and the lack of coordination among countries further permitted these MNEs... to avoid some of the regulatory power imposed by countries, including their taxing obligations. The international tax regime has proven incapable of stopping them... Consequently, countries in general face a revenue crisis.")
funding for any number of worthy public goals; the development of transport networks; abatement of various forms of pollution; the provision of affordable housing; expansion of educational institutions and corresponding tuition support—the list is a lengthy one. The idea that we live in a time of austerity has been accepted as a truism, and even the prosperous states of Europe have become unlikely advocates for a drastic rollback of public spending.30

At the same time, there is an endless stream of expert commentary to the effect that global society is becoming ever more unequal, with a small number of hyper-rich controlling record percentages of overall wealth.31 Thomas Piketty’s recent bestselling book added academic rigor to the popular perception that basic goods and services are increasingly out of reach of working people in many societies, even those in the developed world.32 There are now large populations of poor and working poor in even the wealthiest states.33 The post-World War II social compact, with its expectation of intergenerational progress, is crumbling.34 Under current political structures, simply to know this (in the sense of general awareness) does not lead to institutionalized improvement or change. Legislation that favors both the working and middle classes is increasingly difficult to achieve, while legislatures respond readily to the wishes of the so-called “one percent.”35 The audacity of the hyper-wealthy is a manifestation of the


31. See OXFAM Int’l, Pulling the Plug: How to Stop Corporate Tax Dodging in Europe and Beyond 1 (2013) (“In a world where 80 people own as much wealth as the poorest half of the global population, the recognition that growing inequality is a threat for everyone is slowly starting to emerge.”).


From the end of World War II through the mid-1970s, the real wages of American workers nearly doubled, moving up in tandem with the growth in productivity. The United States benefited from an implicit social contract: by working hard and contributing to productivity, profits and economic growth, workers and their families could expect improved living standards, greater job security, and a secure and dignified retirement. This social contract broke down after 1980, as employees lost their bargaining power.

Id.

35. See Who Exactly Are the 1%?, ECONOMIST (Jan. 21, 2012), http://www.economist.com/node/21543178 (“[T]he average household income of the 1% was $1.2m in 2008.”). The article
increasingly entrenched domination of corporate interests over most aspects of policy-making, across a variety of nations.\textsuperscript{36}

While the main subject matter of this article is focused on tax avoidance by corporations, it is imperative that we see such corporate maneuvers as part of a larger historical trend—a trend in which law and policy are increasingly controlled and drafted according to the interests of the largest corporations. It should be noted that, as the CEOs of tax-avoiding corporations say, most elaborate corporate stratagems aimed at cutting tax bills are "perfectly legal."\textsuperscript{37} This reality, legal but socially detrimental, arguably obtains in such other (non-tax) areas as global trade regulation, other regulatory policy, including environmental rules, social policies such as pensions, labor rights and so forth. To a startling degree, the decades since the 1980s, in particular, have seen a sharp rise in the power of corporations in influencing legal outcomes and defining the sphere of what is permissible.\textsuperscript{38} At the heart of this evolution is the fact that most large corporations no longer pay significant taxes on profits earned.\textsuperscript{39} Over several decades, corporate obligations to workers have thinned out, and obligations to the societies in which corporations operate have similarly

also mentions that the 1\%, when "measured by net worth, rather than income, the top . . . started at $6.9m in 2009." \textit{Id.}


\textsuperscript{37} See \textit{Zucman}, supra note 26, at 102 ("[M]ultinational groups, advised by great auditing and consulting firms, are in practice free to move their profits wherever they want, which is usually wherever it is taxed the least; and large countries have themselves mostly given up taxing the profits booked outside of their territory."); see also Jim Tankersley, \textit{Tim Cook's Defense of Apple's Tax Strategy, Annotated}, \textit{Wash. Post} (Aug. 25, 2015), https://www.washingtonpost.com/news/wonk/wp/2016/08/25/tim-cooks-defense-of-apples-tax-strategy-annotated/.

\textsuperscript{38} See Zaid Jilani, 12 Tax-Dodging Corporations Spent $1 Billion to Influence Washington Over the Last Decade, \textit{Think Progress} (Apr. 13, 2011), https://thinkprogress.org/12-tax-dodging-corporations-spent-1-billion-to-influence-washington-over-the-last-decade-8be25e6659b0#.v28yij7pn (noting in detail that many of the largest corporations in the US, while spending large amount of money to lobby members of Congress, have paid almost nothing in corporate taxes). Indeed, many businesses have received generous rebates and refunds. \textit{Id.} Large banks, telecommunication companies, oil and technology companies—many of which have paid essentially nothing in federal taxes over many years. \textit{Id.}

\textsuperscript{39} Many commentators have noted the steep decline in corporate taxes as a proportion of government revenue over the past decades. See, e.g., Joel Friedman, \textit{The Decline of Corporate Income Tax Revenue 4} (2003), available at http://www.cbpp.org/sites/default/files/atoms/files/10-16-03tax.pdf ("[T]he share that corporate tax revenues comprise of total federal tax revenues also has collapsed, falling from an average of 28 percent of federal revenues in the 1950s and 21 percent in the 1960s to an average of about 10 percent since the 1980s."). This was written in 2003, and the share of government revenue occupied by corporate tax receipts has fallen significantly since then, with corporate tax avoidance persistently increasing.
attenuated. While this is generally known, the reaction of the political class is ineffective at best.40

This larger context must be central to the discussion, since economic subject matter is often wrongly treated as of specialized and niche interest. It is perhaps more comforting to discuss human rights and the obligations of states to their citizens in isolation, separate from technical economic matters. Generally speaking, there is little intersection between the discourse of the broader public good and economic analysis. When it comes to legal academia, these two worlds, economic regulation and human rights, do not frequently collide. One objective of this article is to contextualize public dissatisfaction over corporate taxation and to account for the failure of our global system to require meaningful payment of corporate taxes.

A larger purpose of this article is to bring together the widespread awareness of the tax avoidance/tax evasion epidemic with the issue of effective remedies. It has become clear that the problem will never be seriously addressed if it is approached in only a technocratic manner. The issues of revenue and its distribution are inherently political, and must be seen as such. With the right intentions, tax laws can be explained and rewritten in a manner accessible to the public. As is also true of international trade law, tax law is too important to be left to tax lawyers.

II. The State of Play in Our Age of Tax Avoidance

A. Home Is Offshore

It has become increasingly apparent that large, successful, multinational corporations do not pay anything like their “fair share” of taxes.41 Indeed, over the past few years, it has become the norm for companies with global

40. It is also significant that U.S. law has not required taxes paid by corporations to be made public, thus making it difficult for researchers to determine how much tax is actually being paid by any given corporation. See Joshua D. Blank, Reconsidering Corporate Tax Privacy, 11 N.Y.U. J. L. & Bus. 31 (2014) (describing the evolution of this policy and the difficulties posed by lack of tax transparency). For a concrete example of how corporations manage to avoid detection in their use of global subsidiaries to avoid taxation, see MARC AURERBACK & FRANK CLEMENTE, THE WALMART WEB: How the World’s Biggest Corporation Secretly Uses Tax Havens to Dodge Taxes 4 (June 2015), available at http://americansfortaxfairness.org/files/TheWalmartWeb-June-2015-FINAL1.pdf, providing such examples as the fact that “although Walmart does not have a single store in Luxembourg, it has 22 shell companies there, 20 of which have been established since 2009, and five of which were registered in 2015 alone.” The same report explains that “Walmart gives many of its tax haven subsidiaries obscure names like ‘Azure Holdings’ or ‘MCLM III,’” which turns the simple task of identifying them into a major investigative effort.” Id. at 1.

41. There are different approaches to the issue of what constitutes a “fair share” of taxes, although by any measure the current situation is rife with distortions. For any attempt to explore an objectively sound basis for thinking about fair allocation, see Adam H. Rosenweig, Defining a Country’s “Fair Share” of Taxes, 42 FLA. STATE UNIV. L. REV. 373 (2013), setting out a theory of international tax allocation. Zucman points out that fifty-five percent of all the foreign profits of U.S. firms are now kept in tax havens. See ZUCMAN, supra note 26, at 4.
reach to structure their tax affairs in such a way as to essentially decide
themselves how much tax they will or will not pay.42 As mentioned, this is
euphemistically referred to as “tax planning.” Needless to say, no company
will voluntarily pay more than required by law. Corporations even couch
this avoidance as part of their fundamental “obligation” to shareholders.43 It is
widely thought that there is more than twenty trillion dollars in corporate
profits stashed within the intricate drawers of international tax avoidance
centers, with U.S. companies alone parking more than $2.1 trillion in such
jurisdictions.44 Apple, the premier American corporation, holds more
money offshore than any other.45 Both the least and the most wealthy
countries are being deprived of massive amounts of tax that would otherwise
be due from profitable corporations, including those companies that are the
most successful, well-known, and highly regarded.46 The relationship
between national governments, corporations, and tax professionals has
reached the point where virtually no multinational enterprise feels
compelled, or is legally required, to pay any particular percentage of tax on
 corporate profits.47 Indeed, international “tax cooperation” in the form of
bilateral tax treaties is likely to facilitate, rather than deter, an absurdly small

42. See Zucman, supra note 26, at 4. Zucman points out that 55 percent of total foreign
profits of U.S. based firms is “made” in “six low or zero tax countries: the Netherlands,
Bermuda, Luxembourg, Ireland, Singapore, and Switzerland.” Id. He goes on to note that
“[n]ot much production or sale occurs in the offshore centers; very few workers are employed
there,” and further that “profits appear in Bermuda by sheer accounting manipulations.” Id.
43. For an analysis of this kind of argument, see generally Terry Macalister, Tax Avoidances
2013/sep/08/tax-avoidance.
44. See Clark Mindock, US Tax Evasion Cases: Apple, GE Among American Companies Holding
$2.1 Trillion in Offshore Accounts, INT’L BUS. TIMES (Oct. 6, 2015, 4:07 PM), http://www.ibtimes
.com/us-tax-evasion-cases-apple-ge-among-american-companies-holding-21-trillion-offshore
2129580. Quoting recent studies, the article indicates that 72 percent of Fortune 500
companies operate subsidiaries in tax haven jurisdictions. Id.
45. See Bad Apple, AMERICANS FOR TAX FAIRNESS, http://www.americansfortaxfairness.org/
badapple (last visited Jan. 29, 2017) (pointing out that Apple held $82.6 billion in offshore
profits in 2012); see also Lee Sheppard, How Does Apple Avoid Taxes, FORBES (May 28, 2013, 7:46
#67584106d6f7 (indicating that Apple’s foreign sales earnings are routed through Irish
subsidiaries and literally taxed nowhere).
46. See, e.g., Leslie Wayne, The Global Muckraker: UN Panel: Corporate Tax Avoidance Is Africa’s
Biggest Financial Drain, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 10, 2014,
10:30 AM), https://www.icij.org/blog/2014/02/un-panel-corporate-tax-avoidance-africas
biggest-financial-drain (“[A]n estimated $50 billion a year seeps out of Africa through illicit
capital outflows, which is twice as much as the amount of foreign aid the continent receives each
year.”). The article points out that multinational corporations extract resources from Africa,
but pay little in taxes. See id.
47. See Tom Bergin, Special Report: How the UK Tax Authority Got Cozy with Big Business,
BQ03220121227; SCOTT KLLINGER & KATHERINE MCFATE, THE CORPORATE TAX RATE
DEBATE: LOWER TAXES ON CORPORATE PROFITS NOT LINKED TO JOB CREATION (2013),
The authors argue that:
corporate tax burden. Cooperative efforts to establish an agreed-upon corporate tax floor, or to allocate profits in a fact-based way to the jurisdictions where they are actually generated, have so far failed to bear real fruit. Indeed, the core problem with tax avoidance is one of allocation, in that there is no required and internationally accepted method for allocating profits among the component parts of a corporate entity, in a manner that reflects the actual site of corporate profit-generating activity. While complex, such a method could be devised and enforced with relative ease, given sufficient political will. Honest allocation should be the guiding principle for international tax reform, whereas manipulative allocation is currently the main skill of tax accountants.

No matter what the ideal level of corporate tax might be, major corporations are paying abnormally low levels—sometimes as low as nothing at all. Elaborate and misleading corporate devices have been created to assist large companies in tax avoidance, and this is well known to all players in the game, including elected officials. In that sense, the technical

the heads of major tax committees in Congress, lobbied heavily by corporate CEOs, have a different idea. They want to trade the revenue gained by closing tax loopholes for a lower overall corporate tax rate on profits . . . [and] lock in lower corporate tax rates under the guise of "simplifying" the tax code.

Id. at 5. The article argues that the purported justification of wanting these corporations to create more jobs is not credible. Id.


49. The European Commission continues to put forth its “wish list” for coordinated European tax reform. See Action Plan on Corporate Taxation, EUR. TAXATION & CUSTOMS UNION (June 2015), http://ec.europa.eu/taxation_customs/taxation/company_tax/fairer_corporate_taxation/index_en.htm (describing the main elements in the Commission’s planning on this issue, designed to ensure that European profits are not diverted through a small number of low tax or no tax jurisdictions within the EU).

50. See Milt Isaacs, Beyond Panama: Making the Fight Against Tax Avoidance More Than a Name and Shame Game, PUB. FIN. (June 3, 2016), http://www.publicfinanceinternational.org/opinion/2016/06/beyond-panama-making-fight-against-tax-avoidance-more-name-and-shame-game (arguing that the scale of the problem and an outline of a solution are both well known, but that what is lacking is the commitment and political will to bring about fundamental tax fairness).

51. See Cyrus Farivar, If Apple Didn't Hold $181B Overseas, It Would Owe Apple $59B in US Taxes, ARSTECHNICA (Oct. 7, 2015), http://arstechnica.com/business/2015/10/apple-google-microsoft-hold-more-than-336b-overseas-via-legal-tax-loopholes/ (describing typical devices through which the largest US companies avoid US taxes: big American firms sell or license foreign rights for intellectual property developed in the United States to a subsidiary in a low-tax country). All profits derived from that technology are then attributed to the foreign subsidiary. See id.

murkiness of tax law loopholes and avoidance methodologies is not aimed at deceiving officials, but rather keeping the full reality from journalists, and by extension the general public; members of which, must pay their own income taxes on time and in full.\textsuperscript{53} The largest corporations are understandably disinclined to pay "real" taxes merely as a result of moral exhortation by politicians seeking to tamp down a temporary uptick in popular anger.\textsuperscript{54} Not surprisingly, witnessing this futile ritual of blame and justification further agitates global electorates, but the nature of these political and financial ruses is such that corporations feel little, if any, immediate pressure to change.\textsuperscript{55}

Without far more public pressure than has been brought to bear so far, politicians are unlikely to rewrite laws aimed at enforcing principles of genuine tax fairness. Despite holding hearings and scolding corporate executives, politicians themselves are deeply implicated in the game of "tax competition" and unwilling to take drastic steps that could disrupt the market mood.\textsuperscript{56} This remains the case despite the fact that most modern states are suffering from the "revenue starvation" described above—a circumstance in which the general public is treated to austerity, and public goods experience profound disinvestment. There is an obvious cause and effect relationship between failure of corporations to pay their fair share of tax, and the budget crises experienced in virtually all countries, large and small.\textsuperscript{57} This article will explore below the main models being proposed for

\begin{itemize}
\item \textsuperscript{53} A separate, but obviously related, matter is that wealthy individuals also find mechanisms that allow them to avoid taxation, leading to situations where the very wealthy pay far less proportionately than those low wage individuals who serve their needs.
\item \textsuperscript{55} See Sara Dillon, Anglo-Saxon/Celtic/Global: The Tax-Driven Tale of Ireland in the European Union, 1 N.C. J. INT'L L. & COMM. REG. 36 (2010) (providing background on Ireland's special relationship to tax avoidance strategies). "Belatedly, the European Union began to consider concrete steps towards creating uniform standards for calculating corporate taxes throughout the EU. As tax has been Ireland's sole economic strategy for more than fifteen years, Ireland has understandably continued to fight European tax coordination with determination." Id. at 37-38.
rigorous corporate tax reform and enforcement, scrutinizing current initiatives, however sporadically pursued, at national, regional, and international levels.

Just as the public struggles to understand free trade agreements they are powerless to influence, so too is the general public kept from understanding the mechanisms of tax avoidance enjoyed by the world’s largest corporations. Periodic revelations of shell companies, tactical inversions, internal corporate “asset stripping” loans, and similar tax avoidance stratagems have all failed to slow the growth of these mechanisms. It is also clear that absent some global political sea change, no national government, and not even the European Union, is likely to write firmly enforceable, sufficiently clear laws that run counter to the needs and wishes of multinational corporations. At the political level, representatives of large corporations argue that a low or no corporate tax rate is in fact “better” for ordinary people because higher rates of taxation would be passed on to the consumer.

Few would dispute that national and international financial policy is currently directed by the demands of multinational corporations, as designed by their armies of lawyers and accountants. A world in which governments write rules for private parties to follow, based on notions of the common good or supportive of the middle class, seems quaintly old fashioned from the vantage point of 2016. The influence of corporations in the development of policy renders most political activism futile, as it does not affect ultimate policy outcomes. While the general public understands that multinational corporations behave in ways contrary to the public good, they are often helpless to exert any influence over this reality. Politicians tend


59. See, e.g., Julie Martin, EU Ministers Unable to Agree on Multinational Anti-Tax Avoidance Rules, Compromise Plan Offered, MNE Tax (May 25, 2016), http://mnetax.com/15328-15328. But in recent days, EU Finance Ministers have adopted the “Anti-Avoidance Directive,” raising hopes that the EU will deal with at least some of the most egregious tax avoidance methodologies. Discussed infra.

60. See, e.g., Syed Kamall, supra note 20; Andrew Goodall, Ireland Retains Focus on Tax Competition, AccountingWEB (Oct. 15, 2014), http://www.accountingweb.co.uk/business/financial-reporting/ireland-remains-focus-on-tax-competition (describing Irish efforts to “reform” and retain its much-criticized “Double Irish” system).

to limit their commentary to vague concepts such as "corporate greed" or "Wall Street recklessness," as if the main problem were a moral one.62

The manner in which professional schools teach "tax law" in isolation from other subjects would appear to contribute to this crisis of revenue starvation—as mastering the techniques of tax avoidance has come to be seen as a goal of specialized studies in taxation and tax law.63 The task of unraveling secretive and convoluted tax avoidance vehicles should not be left to investigators or whistleblowers, who—even with enormous effort—cannot uncover sufficient data on every company engaging in these practices.64 Rather, tax avoidance schemes will only cease to be a common feature of economic life when states ensure that these secretive practices are explicitly unlawful, through statutory reform, and appropriate sanctions brought to bear.

B. WHAT LUXLEAKS REVEALED TO ALL: HUGE TAX AVOIDANCE HIDING IN PLAIN SIGHT OF THE "SOCIAL MARKET"

The "LuxLeaks" revelations burst onto the European scene in November 2014—the product of dedicated, investigative journalism.65 LuxLeaks provided concrete evidence of corporate tax evasion on a staggering scale, and demonstrated the key role of government officials in facilitating this tax evasion. Luxembourg entered into "special agreements" for years with multinational corporations, allowing them to funnel their money through Luxembourg via accounting devices that slashed overall corporate tax bills,


63. This is true of economic law subjects generally. The author has made similar critiques in the context of international trade law. See Sara Dillon, Opportunism and Trade Law Revisited: the Pseudo-Constitution of the WTO, 54 B.C. L. REV. 1005 (2013).


often to virtually nothing at all. Although structured in the form of individual “agreements” between the national authorities and corporations, the scale and persistence of this practice made clear that assisting with tax avoidance was a key pillar of Luxembourg’s national policy.

These special agreements were made by Luxembourg with the most famous corporations in the world: Ikea, Disney, Amazon, Pepsi, Deloitte, and others. The accounting devices relied on included rules allowing the companies to borrow from themselves, with correspondingly generous tax deductions for the interest on those “loans.” As in other such examples of large-scale, endemic tax avoidance, the corporations and the government of Luxembourg quickly pointed out that the arrangements were “perfectly legal”—in the sense that they did not violate any explicit tax laws of the jurisdiction. That was, of course, the problem—the fact that no clear laws (national, European or international)—actually existed to prevent such unrepentant tax avoidance. Moreover, not only is the government of a Luxembourg deciding what its own companies will pay, it is making secretive decisions that affect the lives and well-being of millions of people

66. See Bowers, supra note 3 (“The leaked papers show Luxembourg acting as a go-between, both enabling and masking tax avoidance, which always takes place beyond its borders. The documents are mainly Advance Tax Agreements—known as comfort letters... These ATAs are typically schemes put to the Luxembourg tax authorities which, if implemented, reduce tax bill substantially.”).

67. See Wayne, supra note 64 (describing the extent to which the Luxembourg authorities were involved with the world’s major accounting firms to provide multinational companies with the mechanisms to avoid paying anything like a normal rate of tax).


69. See Michael Hudson, Sasha Chavkin & Bart Most, Big 4 Audit Firms Play Big Role in Offshore-Murk, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 5, 2014), https://www.icij.org/project/luxembourg-leaks/big-4-audit-firms-play-big-role-offshore-murk (describing how PricewaterhouseCoopers helped multinational companies to obtain as many as 548 tax rulings in Luxembourg between 2002 and 2010). It details how companies funneled many billions of dollars in profits through the Duchy, and in turn saved billions of dollars in tax payments. Id. The article notes that one “popular address” for Luxembourg-based subsidiaries of multinational companies was home to 1,600 companies. Id.

70. See Teri Sprackland, Antoine Deltour- The Luxleaks Whistleblower, TAX ANALYSTS (Dec. 21, 2015), http://www.taxanalysts.org/content/antoine-deltour-luxleaks-whistleblower. The author notes that:

Many people had to have known about Luxembourg’s secret tax rulings—from government officials to hundreds of company executives and staff to a battalion of tax lawyers and accountants. Yet only one man, a 24-year-old auditor barely two years into his career at PricewaterhouseCoopers LLP, decided that although legal, the private rulings were just plain wrong.

Id.
in other, unrelated jurisdictions, in particular the United States.71 Yet various spokespersons have presented this approach as friendly "tax competition," and not the politically unfriendly act it actually is.72

The LuxLeaks scandal broke open during a period when former Prime Minister Juncker of Luxembourg was being installed as the President of the European Commission, an influential and high-profile role in the EU.73 Not only did many of these deals take place on his watch as leader of the Grand Duchy, but his newly installed European Commission was expected to take on the vexed and long-running problem of corporate tax evasion and tax avoidance vehicles within the EU.74 While there were calls for his resignation, nothing came of these demands and he survived a no-confidence vote in the EU’s Parliament.75 At the same time, the drama of EU-imposed austerity in Greece, with ordinary people forced to shoulder the cost of reckless bank behavior in the run up to the financial crisis of 2009, provided a striking contrast to the sweetheart deals enjoyed by the world’s largest corporations.76 The Luxembourg tax deals—which often amounted to permission to pay no taxes anywhere—had been conceived of in the


73. See James Crisp, Grumpy Juncker: ‘Call it EULeaks, not Luxleaks!’, EURACTIV (Sep. 15, 2015), https://www.euractiv.com/section/euro-finance/news/grumpy-juncker-call-it-euleaks-not-luxleaks/; Matthew Holehouse, Jean-Claude Juncker Denies All Involvement in LuxLeaks Tax System, TELEGRAPH (Sep. 17, 2015, 6:17 PM), http://www.telegraph.co.uk/news/worldnews/europe/eu/11872853/Jean-Claude-Juncker-denies-all-involvement-in-LuxLeaks-tax-system.html; See Allison Christians, Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time, 76 TAX NOTES INT’L 1, 2 (2014). ("When journalists breach taxpayer confidentiality, as they did in the LuxLeaks reveal, the public gets a rare glimpse of a tax system so complex that some of its purposes are impossible to understand without extensive expertise or inside political knowledge."); Professor Christians also raises the important question of whether law that is intentionally hidden from the public can actually be termed “law.” Id.


mundane and technocratic world of bureaucratic efficiency. The political outcry was short-lived, and the apparent facilitator if not architect of the infamous deals, Mr. Juncker, retained his leadership position in the European Commission.

The sheer scale of the LuxLeaks example again raised questions as to whether even the high-minded EU member states function as accountable "nation states" in a financially globalized world. The LuxLeaks scandal showed that the Duchy of Luxembourg uniquely focused on providing tax avoidance services, a glaring instance of how far corporate privilege had gone. The number of such deals rose into the mid-300s, and involved hundreds of millions of dollars, all in a state of only 500,000 inhabitants.

As one reviews the information unearthed in this scandal, it seems clear that although Luxembourg was a founding member of the European Union, its principal economic function had become to offer tax avoidance assistance to multinational corporations—most of them founded outside the EU. The same accusation could easily be leveled against Ireland, which, though not a founder member, had been a part of the European Economic Community (EEC, later EC) since 1973.

Clearly, the traditional "nation state" and the legal fiction of "the corporation" had converged at the very heart of the EU in a manner that violated the rights of the working public to progress and development. And yet, it remains to be seen whether even the EU, a supranational entity with an abundance of ambitious public interest goals, will react with sufficient seriousness. A full year after the revelations first broke, it was noted in


80. Id.


82. See State Aid Control, EUR. COMMISSION, http://ec.europa.eu/competition/state_aid/overview/index_en.html (last updated Dec. 9, 2016) (defining state aid as "an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities"). The European Commission has the authority to investigate, prosecute, and reprimand member states who violate rules regarding "state aid." Id. See Treaty on the Functioning of the European Union art. 109-08, May 9, 2008, O.J. (C 115) 91-92 [hereinafter TFEU] (granting the European Commission the authority to investigate member states' taxation schemes and rulings if they violate the state aid regulations); Council Regulation 734/2013, Amending Regulation (EC) 659/1999 Laying Down Rules for the Application of Art. 93 of the EC Treaty O.J. (L.204/15) art.4 (confering the authority on the European Commission to investigate claims of state aid by granting them the power to request information from the member state and the related party to the investigation); but see Neelie Kroes, Why EU State Aid is not the Right Tool to Fight
various outlets that nothing had changed, no loopholes closed, and no definitive anti-avoidance measures adopted in Europe or the United States. In January 2016, the European Commission published a draft Anti-Avoidance Directive, which was in fact adopted by the EU's Finance Ministers in July 2016. While a welcome development, the directive has been criticized as inadequate to the task of eliminating the massive EU-based corporate tax avoidance.

The “LuxLeaks” scandal provided a textbook case of what has occurred in the relationship between corporations and states. The “leaks,” instigated by employees of major accounting firms and placed in the hands of the International Consortium of Investigative Journalists group, showed that many of the world’s most famous and successful firms were lined up at the door of the Luxembourg government, looking for tax deals that would ensure Luxembourg a steady, if very modest, stream of fees, as well as jobs in the financial and accountancy sector, with staggering large tax savings for the companies concerned. This “Luxleaks” behavior had become so prevalent that it was in essence “normal” corporate and accounting behavior in Luxembourg and several other European states. Even more blatant tax-avoidance servicing was characteristic of certain non-EU (but British-affiliated) jurisdictions, such as the Cayman Islands, Bermuda, and others.

Whatever illegal money laundering might be going on in the shadows of these tax avoidance structures, it is clear that LuxLeaks was about the normal

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85. See Eric Maurice, Commission Unveils Anti-tax Avoidance Package, EU OBSERVER (Jan. 28, 2016), https://euobserver.com/economic/132047 (noting that some NGOs have criticized the EU's approach in the directive as completely inadequate to the task). The European Network on Debt and Development, instance, was quoted as saying that “[t]his package is woefully inadequate to stem the tsunami of scandalous cases of multinational corporations failing to pay their taxes.” Id.
87. Id.
88. See Adam Ramsay, Britain's Empire of Tax Evasion, FOREIGN POL'Y (Apr. 4, 2016), http://foreignpolicy.com/2016/04/04/britains-empire-of-tax-evasion-panama-papers-mossack-fonseca/ (linking contemporary tax haven scandals to the British tradition of serving the needs of global wealth, including through its overseas territories).
accounting practices of nations that serve prestigious, well-known multinational corporations, not those laundering the proceeds of criminal activity. Tax avoidance expertise is a winning strategy for smaller states in particular, due to the fact that even very modest infusions of such large amounts of capital can be significant.89 In an interesting way, this strategy allows even very small states to acquire great importance in the global tax sweepstakes, and to cause great financial hardship to much larger (and thus more revenue-needy) states.90

As mentioned, a corporate “who’s who” has been identified with the so-called sweetheart deals in Luxembourg—Walmart, Walt Disney, Microsoft, Koch Industries, and Pepsi.91 As is true for Ireland (enabler of tax avoidance for Apple, Google, and Yahoo, among others), the Netherlands (Starbucks’ tax ally), and the UK, Luxembourg built its own modern economy around serving the large multinationals that stood to gain most from global tax avoidance schemes.92 It is interesting that the first post-Brexit British Prime Minister, Theresa May, has stated that dealing with corporate tax avoidance and evasion will be at the top of her agenda.93

Commission President Junker’s response to the LuxLeaks revelations was quite opaque, as he insisted he was “no more responsible than others” for this state of affairs, and disclaimed direct knowledge of the deals.94 When he survived the no-confidence motion in the European Parliament, the EU missed its chance to send a strong message on collective EU opposition to these practices.95 There is certainly irony in the fact that the “nerve center”

91. See Fitzgerald & Guevara, supra note 68; Crisp, supra note 73.
92. See supra note 3 (describing the generally accepted principle that Luxembourg is one of the biggest European tax havens); Nicholas Shaxson, Follow the Money: Inside the World’s Tax Havens, THE GUARDIAN (Jun. 19, 2015), https://www.theguardian.com/business/2015/jun/19/tax-havens-money-cayman-islands-jersey-offshore-accounts (noting that Luxembourg is a well-known European tax haven that provides flexibility for multinational corporations seeking to avoid paying higher taxes in other E.U. member states); see Simon Bowers, Luxembourg Warned about its Reliance on Multinational Corporations, THE GUARDIAN (Mar. 29, 2015), https://www.theguardian.com/world/2015/mar/29/luxembourg.warned-about-its.reliance-on-multinational.corporations (stating the potential effect of E.U.-level tax reform on the economy of Luxembourg, which is essentially tied to the multinational corporations enticed to open headquarters in that country because of low tax rates).
94. See Alessio Colonnelli, Juncker’s Message to the EU: Tax Evasion is Not That Big a Deal, LEFT FOOT FORWARD (May 7, 2015), http://leftfootforward.org/2015/05/junckers-message-to-the-eu-tax-evasion-is-not-that-big-a-deal/ (relaying Juncker’s statement that he was “no more responsible than others” for the tax deals).
95. As already described, Commission President Juncker managed to survive a no-confidence vote in the European parliament by a wide margin, despite the heated controversy over the Luxleaks revelations. See Juncker Survives No Confidence Vote Over Tax Allegations, BBC (Nov.
of a legalistic, ethically upright, and progressive EU would be led by a politician closely associated with the most extreme tax avoidance schemes in the world, and this disharmony was not lost on the press. But it is a testament to the fact that laws are no longer driven by public outrage or written by elected politicians that actions taken in the wake of LuxLeaks, remain ambivalent. Recent EU initiatives in the anti-tax avoidance realm will be described in more detail below.

If secret agreements between Luxembourg and multinational corporations (many American-based) result in revenue starvation for other countries in the world, this is apparently of no ethical concern to Luxembourg. Similarly, neither Ireland, the Netherlands, nor Singapore appears to connect the dots between their policies on corporate taxation and the revenue deprivation of both rich and poor states. A surprising number of European and non-European states base much of their financial policy on this role of catering to the tax avoidance needs of multinationals, pursuing this aim with full knowledge of the financial implications. They defend these practices as economically beneficial to all, and denounce any threats to their freedom of “choice” in tax matters.

As explained above, many willing governments enter into secret deals with companies seeking assistance in these schemes. Cooperative legislatures provide generous exemptions and attractive loopholes. With the awareness and blessing of governments, lawyers and accountants set up elaborate mechanisms to split companies into smaller and harder to trace units, creating intra-company lending schemes and large numbers of nearly invisible (strangely named, and thus incognito) subsidiaries. In a manner

that is impossible for ordinary workers or for small, nationally-bound businesses, large multinational corporations are thus able to evade any responsibility to pay a fair share of taxation, and thus to support the public interest in the states from which they profit. While periodic revelations cause politicians to express outrage, in fact governments remain hesitant to interfere as companies describe these technically complex schemes as "perfectly legal." And in fact, as has been pointed out, they are mostly legal in the narrow sense.

Despite a great deal of ideological resistance to the very idea of governmental taxing powers within the United States, it is apparent that no society has ever been able to invest in public goods, including health, safety, and general welfare, without substantial infusions of revenue. The United States is a prime example of what happens as a result of disinvestment in public universities, for instance. The concept of tax revenue is as old as organized society itself, with general contributions being used to fund the activities of the sovereign in the name of the people. Tax avoidance and austerity programs go hand in hand; were corporate taxes being collected in a normal manner, a wide variety of countries would be able to cover the costs of educational, developmental, and infrastructural programs with ease. Yet, the obvious steps are not being taken, and perhaps will not be taken.

**C. PAPER CORPORATIONS AND INVERSIONS: TYPICAL METHODOLOGIES OF TAX AVOIDANCE**

As in other areas of law where economics and social policy intersect, the tax avoidance issue is often approached technocratically. As mentioned above, the devices relied upon by corporate accountants are inherently complex and technical (and are meant to be so); the responses of governments are slow and tentative. Academic writing on the subject is correspondingly technical, citing to the relevant tax treaties, statutes, and corporate structuring devices. It is very hard to see how the situation of mass tax avoidance will change without some more accessible link being

Instead, Walmart has kept these tax-haven subsidiaries secretive by burying mention of their existence deep inside of SEC filings and financial documents filed by Walmart subsidiaries all around the world, only some of which are available to the public. Moreover, Walmart gives many of its tax-haven subsidiaries obscure names like ‘Azure Holdings’ or ‘MCLM III,’ which turns the simple task of identifying them into a major investigative effort.

established between crafting political remedies and the complex legal structures that facilitate tax-lowering maneuvers.

High levels of corporate tax avoidance depend upon the reality of globalization. Globalization makes tracing and documenting taxable profits extraordinarily difficult. This is because corporations can now easily change their location, legal residence, and thus the formal legal regime under which they operate. One particular technique used by U.S. corporations that has recently gained the attention of the U.S. public is the "inversion"—a legal device that allows companies to alter their corporate nationality to another (low tax or tax avoidance-facilitating) country, by arranging for its own purchase by a foreign firm.

The excuse given by U.S. companies is, of course, that the “real” tax bill in the United States is too high—even though few, if any, large corporations actually pay such high rates of tax. It is never explained why the U.S. Congress simultaneously denounces the high published rate of U.S. corporate tax, and yet fails to lower it somewhat, in exchange for definitively closing loopholes. It can also be speculated, if not proven, that the U.S. Congress leaves the corporate tax rate unusually high in order to continue to provide cover for corporations offering excuses for failure to pay a fair share

102. Many have made the point that globalization is linked to ease of tax avoidance. See, e.g., LEONCE NDIKUMANA, INTERNATIONAL TAX COOPERATION AND IMPLICATIONS OF GLOBALIZATION, CDP Background Paper No. 24 ST/ESA/2014/CDP/24, Dec (2014) (pointing out that two main effects of globalization no taxation is the move towards harmful tax competition and the easier profit shifting of multinational corporations).


104. Id. at 1590-92.

105. See Kyle Pomerleau, Everything You Need to Know About Corporate Inversions, TAX FOUND. (Aug. 4, 2014), http://taxfoundation.org/blog/everything-you-need-know-about-corporate-inversions. Pomerlau notes that:

an inversion is simply the process by which a corporate entity, established in another country, buys an established American company. . . . In essence, the legal location of the company changes through a corporate inversion from the United States to another country. An inversion typically does not change the operational structure or functional location of a company.

106. See Fact Sheet: Corporate Tax Rates, AMERICANS FOR TAX FAIRNESS, http://www.americansfortaxfairness.org/tax-fairness-briefing-booklet/fact-sheet-corporate-tax-rates/ (last visited Jan. 26, 2017) (noting that the “Corporate share of federal tax revenue has dropped by two-thirds in 60 years” and that despite the legal corporate tax rate of 35%, many big corporations paid far less after deductions and other loopholes, that over 100 very profitable corporations paid no federal income taxes, and that many other developed nations had a higher effective corporate tax rate than the U.S.).

of tax. And it is likely that U.S. corporations prefer to have a high published tax rate, and to pay no taxes at all through legally permissible tax avoidance mechanisms.\footnote{See Fact Sheet: Corporate Tax Rates, supra note 106 (indicating how many large U.S. corporations paid no federal income tax over many years).}

Despite all the EU’s traditional rhetoric on fairness, equality, social inclusion and broadly based prosperity, major EU nations have used such forms as the “Double Irish” and “Dutch sandwich” to help U.S. multinationals avoid billions of dollars in taxes, to the detriment of real people in the United States, Europe, and the developing world.\footnote{The New York Times published a convenient graphic to show how Apple and other companies avoid paying any taxes on profits, regardless of where profits are actually derived. Because of quirks in Irish and Dutch law, the profits could end up untaxed and hidden away indefinitely in Caribbean tax haven jurisdictions. Even though Ireland has pledged to end the “double Irish” practice, it is substituting a similar “innovation box” system, to funnel patent-derived profits in a low tax direction. It seems Ireland believes it can continue providing this “ultra-low” tax service to U.S. multinationals with impunity. See ‘Double Irish With A Dutch Sandwich’, N.Y. TIMES (Apr. 28, 2012), available at http://www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html; see also Richard Curran, Tax Avoidance Culture Still Thrives Despite Clampdown, IRISH INDEP. (Apr. 30, 2015), http://www.independent.ie/opinion/comment/tax-avoidance-culture-still-thrives-despite-clampdown-31182697.html (stating that the driving force behind Irish tax policy is competition). “When it comes to making Ireland attractive for foreign direct investment, we have to do it. Because others will.” Id. Ireland plans to phase out the “innovation box” loophole, which companies exploit by funneling royalty payments to other subsidiaries in low-tax jurisdictions. Id.}

In this sense, it is undeniable that the national governments in Ireland and the Netherlands consider large multinationals to be their clients and work to solidify that bond.\footnote{Steps have been taken to prevent these devices from continuing. See Still Slipping the Net: Europe’s Corporate-Tax Havens Say They Are Reforming. Up to a Point, ECONOMIST (Oct. 8, 2015), http://www.economist.com/news/business/21672232-europes-corporate-tax-havens-say-they-are-reforming-up-point-still-slipping-net (stating the intentions of the Irish and Dutch governments to be similar). In response to public outcry over the “Double Irish with a Dutch Sandwich” tax scheme, the Netherlands plans to implement new physical presence requirements for businesses operating within that country. Id. Despite all the rhetoric surrounding Dutch tax reform, the Netherlands’ focus is primarily on transparency with regard to transactions that allow companies to otherwise avoid paying taxes elsewhere in the Eurozone. Id.; see also Sam Schechner & Lisa Fleisher, Ireland Considers Closing Corporate-Tax Loophole, WALL ST. J. (Oct. 12, 2014), http://www.wsj.com/articles/ireland-considers-closing-corporate-tax-loophole-1413139198 (describing steps taken by the Irish government to close the “Double Irish” loophole). Ireland plans to phase out the “innovation box” loophole, which companies exploit by funneling royalty payments to other subsidiaries in low-tax jurisdictions. Id.}

By focusing on Ireland and the Netherlands, this is not to suggest that Britain, for instance, is any less culpable, as it maintains an elaborate web of tax avoidance schemes within its financial center as well.\footnote{See Nicholas Shaxson, The Tax Haven in the Heart of Britain, NEW STATESMAN (Feb. 24, 2011), available at http://www.newstatesman.com/economy/2011/02/london-corporation-city (describing the special status of the City of London and the secrecy and financial freedom it makes available).} How this behavior might change post-Brexit is unclear. And the number of true tax haven jurisdictions—territories or mini-states that specialize in tax
avoidance—creates a menu of options for companies and individuals increasingly unwilling to pay anything like the actual "sticker price" of tax in any jurisdiction.112

Between Ireland, the UK, and the Netherlands, prominent corporations, such as Google, Apple, Yahoo, Amazon, and Starbucks have avoided literally massive levels of tax. The main tax avoidance schemes rely on chopping up the corporate identity and the corporate profit share into convenient pieces to be allocated to whichever jurisdiction works best for tax avoidance purposes.113 In parallel fashion, the corporation, with the assistance of national tax authorities, chops up global territory in such a way as to make believe that certain events in corporate life took place where they did not in fact take place.114 In essence, profits are "earned" wherever the corporation says they are earned. For tax purposes, there is no longer much sense of national or territorial identity, let alone national obligations.

This article argues that many national governments have made a decision not to seriously attempt to collect taxes otherwise owed by multinational corporations. Global initiatives aimed at reducing the outrage of the tax-paying public (such as the legal changes proposed by the OECD, to be described below) are only partial and will likely fail to change the underlying status quo.115 The EU has wrestled with the problem of tax avoidance and conflicting corporate tax regimes for years; if change is to come from anywhere, it is most likely to derive from creative legal thinking on the part of the EU, as also described below. The U.S. Congress, despite periodic expressions of outrage, shows no definitive inclination to rein in the world-renown tax avoiding behavior of U.S.-grown, multinational corporations. The main U.S. initiatives in this area will also be briefly described below.

The process of globalization—which could have been used as a vehicle to enhance the spread of human rights and social benefits—has instead been captured by the largest and strongest corporations to increase their own


114. See Transfer Pricing, TAX JUST. NETWORK (Feb. 2014), http://www.taxjustice.net/topics/corporate-tax/transfer-pricing/ ("Estimates vary as to how much tax revenue is lost by governments due to transfer mispricing. Global Financial Integrity in Washington estimates the amount at several hundred billion dollars annually. A March 2009 Christian Aid report estimated $1.1 trillion in bilateral trade mispricing into the EU and the US alone from non-EU countries from 2005 to 2007.").

profits, with a corresponding weakening of government responsiveness to
domestic constituencies.116 This is an interesting parallel to the process by
which the main feature of globalization was actually the expansion of rights
and privileges for multinational corporations in the form of free trade-
promoting laws. This enabled corporations to trawl the world for cheap
labor and favorable regulatory environments, while gaining easier access to
all markets.

High on the wish list of corporations is the desire not to contribute to the
public good—either by complying with labor standards, labor rights
(including job security) or by paying significant levels of tax.117 Indeed, not
only have multinational corporations found ways to avoid paying taxes on
profits earned internationally—but these same devices have allowed them to
avoid paying all taxes, contributing only a meager share of their earnings to
the public coffers.118 Many corporations are now not really based
anywhere,119 as the global economy has essentially demoted the notion of
territory and of the defined and authoritative nation state itself.120 The state,
as a viable actor, is seemingly still strong and relevant only for such
territorially-bound matters as criminal law. The largest and most successful
corporations are literally not anchored in nor responsible to any jurisdiction.
All serious discussions concerning how to limit tax-avoiding behavior focus
on how to return corporations to the structure and context of nations,
peoples and places—a task that might yet prove politically impossible.

(May 27, 2013), https://www.theguardian.com/commentisfree/2013/may/27/globalisation-is-
about-taxes-too.
117. See Thomas Byrne, False Profits: Reviving the Corporation's Public Purpose, 57 UCLA L. REV.
Disc. 25, 26 (2010) ("Corporate America has been fixated on share price, blinding corporate
leaders from the macroeconomic effects of their decisions.").
118. See Lee Simmons, Why Corporate Tax Avoidance Is Bigger Than You Think, STANFORD BUS.
(May 24, 2016), https://www.gsb.stanford.edu/insights/why-corporate-tax-shifting-bigger-you-
think (describing pervasiveness of corporate tax avoidance). Multinational companies exploit
their presence in various jurisdictions to shift their income to lower tax jurisdictions. Id. This
practice continues, as regulators around the world find it difficult to enforce new rules. Id.
120. The extraordinary rise of investor-state arbitration is an example of this. See, e.g., Brook
K. Baker & Katrina Geddes, Corporate Power Unbound: Investor-State Arbitration of IP Monopolies
on Medicines—Eli Lilly v. Canada and the Trans-Pacific Partnership Agreement, NORTHEASTERN
arbitration awards reflects a corresponding rise in corporate power vis a vis the state).
III. The Way Forward: Will Anyone Really Shout Stop?

A. SLIDING SCALE OF SOLUTIONS—FROM LEAST TO MOST EFFECTIVE

Because of the LuxLeaks revelations and other news stories to the effect that corporate and personal tax evasion and avoidance are happening on a mass scale, with incalculable social costs, "action" is supposedly being taken at a variety of levels, or at least there is the appearance of action. This article has argued that the basic problem is quite well known to national governments, and far from being shocked, these governments are trying to either defend the notion of "tax competition," or set up committees and pass laws designed to mollify an outraged public. Certain of these proposals are bound to fail, since they close certain loopholes while opening the door to others. Yet, this is a defining moment in the tax evasion and tax avoidance debate. Public interest is high, political outrage is intense, and the situation has not yet become impossible to deal with, given the appropriate level of political will.

As will be outlined below, the proposals being offered by an international tax reform body recently set up by a coalition of NGOs, spearheaded by economist Joseph Stiglitz, and called the “Independent Commission for the Reform of International Corporate Taxation” (Independent Commission), would go far towards actually stopping the problem, although this group has no meaningful political power to induce governments to follow their suggestions. The Independent Commission, as will be explained below, has published an accessible list of recommendations, most of them based around the deceptively simple idea that large corporations need to be considered as one entity, and taxed accordingly, based on where corporate income is derived. Interestingly, the group is a self-declared and independent commission, acting outside any official channels. While this gives it great freedom to identify the problem and its solution, it will likely

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124. Vanessa Houlder, Call to Reform ‘Outdated’ Global Corporate Tax Regime, FIN. TIMES (Oct. 5, 2015), https://www.ft.com/content/8be3e00e-6a89-11e5-ac9-d87542bf8673.

have limited influence. Not surprisingly, there is strong corporate pushback against the group’s ideas.126

Within the EU, the European Commission and European Parliament have for some years been in an uproar over EU member state schemes that have given special tax avoidance privileges to multinational corporations;127 although very good proposals have been considered by the EU institutions, leading to an Anti-Avoidance Directive finally adopted in July 2016, there has been strong internal division and critics insist that the final form of the directive has been greatly watered down.128 The European Commission made global headlines when it ruled in August 2016 that Ireland had granted unlawful state aids to corporate giant Apple, amounting to thirteen billion euros.129 Going forward, it is likely that Commission enforcement action taken under the theory of state aids (tax deals as unlawful subsidies) will be aimed at only a symbolic handful of companies.130 Dating back to 2011, the European Commission put forward proposals of a more fundamental kind based on the idea of accurate allocation of profits.131 The result was its proposed “Common Consolidated Corporate Tax Base,” or CCCTB, the essence of which was to consolidate the profits of any given transnational corporation, while allocating tax revenue to each member state in which the


128. See EU Tax Avoidance Directive, supra note 84, at 1-14; see Suzanne Lynch, EU Agrees New Rules to Fight Corporate Tax Avoidance, IRISH TIMES (June 21, 2016), http://www.irishtimes.com/business/economy/eu-agrees-new-rules-to-fight-corporate-tax-avoidance-1.2693230 (stating that some parties do not believe the new rules will be effective in combating tax avoidance); see Jan Stojaaspal, EU Expects Tax Avoidance Fight to Reaffirm Continent’s Relevance, BLOOMBERG NEWS (Sept. 20, 2016), https://www.bna.com/eu-expects-tax-n57982077290/ (outlining discontent among some member states, as there is a belief that more cooperation between individual member states is needed in order to affect meaningful tax reform on the continent).


130. Note that as of this writing, European Parliamentarian Fabio deMasi is taking the European Commission itself to Court for not handing over documents relevant to a parliamentary investigation into member state tax deals. See Nikolaj Nielsen, MEP takes EU to Court on Tax Transparency, EU OBSERVER (Jan. 14, 2016), https://euobserver.com/economic/131830, ("EU economics commissioner Pierre Moscovici said the consent of member states was needed first, noting that almost half had refused to transmit the documents.").

131. See infra, note 133 and accompanying text.
corporation operated, based on a clear formula for calculating proportionate tax liability.\textsuperscript{132} The core idea was a very good one—moving away from the artifice of corporate “nationality” or residence, using the entire EU territory as a totality, and then allocating tax revenue into national coffers on a more accurate, pro-rata basis.\textsuperscript{133} A version of this concept has survived into the new Anti-Avoidance Directive.\textsuperscript{134} Indeed, if a rigorous profit and tax allocation formula could be followed worldwide, the grosser forms of tax avoidance would be defeated.

In the face of such audacious tax avoidance behavior by multinational corporations and the apparent tacit policy support of national governments, it is not clear where the “cure” might come from, if it is to come at all. As described above, the legal landscape is technical and complex, and the detailed understanding of the public limited. This section of the article will explore the manner in which the problem has been framed by different “players” in the debate, and what suggestions for change have been offered. To be examined, in this order, will be responses of the OECD, the European Union and the United States government. The final discussion will be of the recommendations of the “Independent Commission” on international taxation, the global tax fairness advocacy group described above. It would appear that the problem of corporate tax avoidance is far easier to identify than to resolve, and that if a remedy is to be found, it will in all probability be within the creative legal formulations of the EU’s Commission and

\begin{itemize}
\item \textsuperscript{132} See \textit{Common Consolidated Corporate Tax Base (CCCTB), European Comm’N, available at http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm} (last updated Jan. 27, 2017) (defining the CCCTB as “a single set of rules to calculate companies’ taxable profits in the EU”). It continues:
  
  a company would have to comply with just one EU system for computing its taxable income, rather than different rules in each Member State in which they operate …. The consolidated taxable profits of the group would be shared out to the individual companies by a simple formula.

  \textit{Id.} This idea of accurate allocation of profits is at the heart of virtually all proposed solution to the tax haven problem.


  The CCCTB essentially aggregates related EU companies into a single, consolidated tax return for all those [corporate] entities. The EU group net taxable income is then apportioned back out to each entity and country in proportion to the relative assets and other economic factors within those locations. Thus, the CCCTB is a system of formulary apportionment which abandons the existing arm’s length standard of treating each inter-company transaction separately.

  \textit{Id.}

\end{itemize}
Parliament. But, as indicated, the EU itself is not completely unified in outrage over these practices. The resistance of its component parts necessarily limits the EU’s ambitions, and several of these “component parts” have been among the greatest abusers of global tax avoidance schemes.

B. WHAT WOULD THE OECD HAVE US DO?

In one sense, the OECD may be an unlikely place to look for a genuine solution to corporate tax avoidance and evasion, despite the accuracy with which it has identified problems in the international taxation order. The OECD, as an organization, is comprised of the nations whose largest companies have been allowed to get away with the kind of aggressive tax planning the OECD claims it now wishes to end. In 2013, the OECD published its “Action Plan on Base Erosion Shifting” (commonly known as “BEPS Action Plan”) to much fanfare. The essence of this plan, and accompanying reports, was to create guidelines for governments to follow as they addressed the problem of corporate tax avoidance, specifically by setting out the areas where national legislation should target corporate tax-avoiding behavior. In one sense, this represents the limit of what the

135. Ireland for one is deeply worried that after the British exit from the EU, the EU will be in a stronger position to come after Ireland’s low corporate tax rate. See, e.g., Kevin Doyle, EU has our corporation tax in its sights after UK quits, IRISH INDEPENDENT (June 27, 2016), http://www .independent.ie/business/brexit/eu-has-our-corporation-tax-in-its-sights-after-uk-quits-34835831.html.

136. Notably, Ireland, the Netherlands, Luxembourg and Britain before “Brexit”. See Still Slipping the Net: Europe’s Corporate-Tax Havens Say They Are Reforming. Up to a Point, supra note 110.

137. The Organization for Economic Co-operation and Development (OECD) is a forum made up of governments from 35 states with market economies, along with 70 non-members with the goal of identifying global economic issues with the aim of promoting economic growth, prosperity and sustainable development. For more background on the OECD, see generally About the OECD, OECD, http://www.oecd.org/about/.


139. Org. for Econ. Co-operation and Dev. [OECD], Action Plan on Base Erosion and Profit Shifting, 10 ISBN 978-92-64-20271-9 (July 19, 2013), available at http://dx.doi.org/10.1787/ 9789264202719-en (“BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from the jurisdictions where the activities creating those profits take place.”) [hereinafter Action Plan]. And with its 15 identified BEPS “Actions” to be addressed by OECD governments, the Action Plan states, “[t]he BEPS project marks a turning point in the history of international co-operation on taxation.” Id. at 25. For further background to OECD thinking on the corporate tax avoidance issue, see Yariv Brauner, What the BEPS?, 16 FLA. TAX REV. 55 (2014) (describing the OECD approach to revelations of massive global tax avoidance by corporations and the core concept of “base erosion”). The “base” here refers to the tax base in any given country. Id.

140. See Action Plan, supra note 139, at 15. The Action Plan states, “globalization means that domestic policies, including tax policy, cannot be designed in isolation.” Id. Also that there must be “instruments to put an end to or neutralise the effects of hybrid mismatch
OECD can do; it has no means of coercion or enforcement, and exists to articulate consensus approaches to problems in the international economic order. To the extent that it has any real powers of persuasion, this only extends to its membership of wealthy, industrialized countries. While these countries represent the base of operations for the world's largest corporations, the OECD does not include among its members some of the most egregious tax avoidance-facilitating jurisdictions.

The OECD sensibly identifies globalization and digitalization as the chief enablers of mass corporate tax avoidance. It has been predicted that the "epic reforms" being called for by the OECD will, or at least could, have "a huge impact on the way multinational corporations run their operations . . . " While it is fair to say that the OECD countries are home to the companies most energetically availing of tax avoidance devices, at the same time, OECD governments have demonstrated a surprising degree of tolerance as their corporations blatantly avoided paying a fair share of taxes. In this sense, it should be asked whether the OECD has the capacity to make the kind of difference to be hoped for, especially in light of the fact that enforcement of these principles is left to participating arrangements", which "can be used to achieve unintended double non-taxation or long-term tax deferral . . . " Id.


As indicated in the September 2014 report, countries remain free in their policy choices as to whether the hybrid mismatch rules should be applied to mismatches that arise under intra-group hybrid regulatory capital. Where one country chooses not to apply the rules to neutralize a hybrid mismatch in respect of a particular hybrid regulatory capital instrument, this does not affect another country's policy choice of whether to apply the rules in respect of the particular instrument.

142. See About: Members and Partners, supra note 138.

143. The most notorious offshore jurisdictions, such as the Cayman islands, are of course not included in OECD membership. See id.

144. See Action Plan, supra note 139, at 10. OECD members are called on to "Identify the main difficulties that the digital economy poses for the application of existing international tax rules and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation." Id. at 14.


146. See, e.g., The Price Isn't Right, ECONOMIST (Feb. 16, 2013), http://www.economist.com/news/special-report/21571557-corporate-profit-shifting-has-become-big-business-price-Isn't-right (describing the process by which public outrage has finally spurred governments to take some action to reform the decades-old and very outdated system of taxing corporations).
governments. In fairness, a number of OECD jurisdictions claim that they do intend to enact the OECD-based reforms, so it may be that the OECD reports and recommendations ultimately provide a serious roadmap for reform. Indeed, the EU, in its most recently proposed reforms, gives credit to the OECD for providing a fundamental tax reform template.

One key aspect of the OECD “solution” is country-to-country information sharing. The core idea is that if countries have access to

147. See Harpaz, supra note 145.

[b]ecause many of the recommendations require legislative changes or incorporation into income tax treaties, it may be thought that the impact of the OECD’s recommendations may be somewhat muted in the United States, at least initially, as the changes would take some time to implement. However, a number of actions from Treasury and the IRS in recent months indicate that the impact of the changes resulting from the BEPS project may be coming sooner than expected.

Id.

149. See Press Release, European Comm’n, The Anti-Tax Avoidance Package—Questions and Answers, MEMO/16/160, (Jan. 28, 2016) (“[T]he Commission is pursuing an ambitious campaign for a coordinated EU approach against tax avoidance, following the global standards developed by the OECD last autumn, to boost Member States’ collective stance against this problem . . .”).

150. See Org. for Econ. Co-operation and Dev. [OECD], Mandatory Disclosure Rules, Action 12 — 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, ISBN 978-92-64-24144-2 (Oct. 5, 2015), http://dx.doi.org/10.1787/9789264241442-en [hereinafter Mandatory Disclosure Rules]. In an effort to increase transparency and access to accurate and timely information, the action plan imposes a mandate on governments to implement policies to strengthen already existing mandatory disclosure requirements or to develop strategies with the same effect, as a means of imposing pressure on the tax avoidance market. See id. Action 12 sets
information on corporate earnings and tax payments in fellow OECD countries, policing corporate tax affairs would become easier—however, this obviously assumes that governmental authorities in the OECD countries truly intend to crack down on corporations as soon as this information is available. This is, as has been noted, a somewhat questionable proposition, or at least has yet to be shown to be effective. It also assumes that participating countries are willing to legislate past the status quo, under which most of the tax avoidance multinational corporations are guilty of remains “perfectly legal.” This, in fact, is the crux of the problem.

out a modular framework for both domestic and international tax schemes and addresses issues of “who reports, what information to report, when the information has to be reported, and the consequences of non-reporting.” Id. at 10. The key components of a mandatory disclosure scheme include:

[The imposition of] a disclosure obligation on both the promoter and the taxpayer, or . . . on either the promoter or the taxpayer; include a mixture of specific and generic hallmarks, the existence of each of them triggering a requirement for disclosure . . .; establish a mechanism to track disclosures and link disclosures made by promoters and clients as identifying scheme users . . .; link the timeframe for disclosure to the scheme being made available to taxpayers when the obligation to disclose is imposed on the promoter; link it to the implementation of the scheme when the obligation to disclose is imposed on the taxpayer; introduce penalties (including non-monetary penalties) to ensure compliance with mandatory disclosure regimes that are consistent with their general domestic law.

Id.

151. See id. The OECD has set out a three-tier standardized approach to transfer pricing documentation that requires:

First, it requires multinational enterprises (MNEs) to provide tax administrations with high-level information regarding their global business operations and transfer pricing policies in a “master file” that is to be available to all relevant tax administrations; second, detailed transactional transfer pricing documentation must be provided in a “local file” specific to each country, identifying material related party transactions, the amounts involved in those transactions, and the company’s analysis of the transfer pricing determinations they have made with regard to those transactions; third . . . file a Country-by-Country Report that will provide annually and for each tax jurisdiction in which they do business the amount of revenue, profit before income tax and income tax paid and accrued.

Org. for Econ. Co-operation and Dev. [OECD], Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2014 Deliverable, at 17-20, OECD/G20 Base Erosion and Profit Shifting Project, ISBN 978-92-64-21923-6 (Sept. 16, 2014), http://dx.doi.org/10.1787/9789264219236-en [hereinafter Guidance on Transfer Pricing]. It also requires MNEs to report their number of employees, stated capital, retained earnings and tangible assets in each tax jurisdiction. Id. at 35. Finally, it requires MNEs to identify each entity within the group doing business in a particular tax jurisdiction and to provide an indication of the business activities each entity engages in. Id. at 36.

152. See Reuven S. Avi-Yonah and Haiyan Xu, Evaluating BEPS, 185 HARV. BUS. L. REV. (2016), for a penetrating critique of the proposed BEPS program.

On the positive side, the OECD reports reflect a keen awareness of the nature of the tax avoidance problem in all its complexity. The organization covers both the details of manipulative transfer pricing and the need for greater international transparency—and thus goes after both technical implementation and a broader, more transcendent set of tax principles. It calls for an end to tax treaty abuse that leads to “double non-taxation,” as well as such devices as excessive deductible payments of interest (often on loans made by the corporation to another arm of itself) and manipulated transfer pricing between companies and their subsidiaries.

It does seem that the OECD proposals have already had some preliminarily positive effects, especially with regard to pre-emptive changes in corporate behavior, with tax planners taking into account that real changes (at the national legislative level) may be on the horizon. But there

154. See, e.g., Mandatory Disclosure Rules, supra note 150.


In the area of transparency, a framework covering all rulings that could give rise to BEPS concerns in the absence of compulsory spontaneous exchange has been agreed. The framework covers six categories of rulings: (i) rulings related to preferential regimes; (ii) cross border unilateral advance pricing arrangements (APAs) or other unilateral transfer pricing rulings; (iii) rulings giving a downward adjustment to profits; (iv) permanent establishment (PE) rulings; (v) conduit rulings; and (vi) any other type of ruling where the FHTP agrees in the future that the absence of exchange would give rise to BEPS concerns. This does not mean that such rulings are per se preferential or that they will in themselves give rise to BEPS, but it does acknowledge that a lack of transparency in the operation of a regime or administrative process can give rise to mismatches in tax treatment and instances of double non-taxation.


158. It is clear that tax accountants and lawyers have been intensely focused on how to assist their clients in avoiding tax. Were the OECD standards to become generally applicable, it would represent a profound change. See, e.g., Laurence Knight, Corporate Tax Avoidance: How
is intense suspicion among developing countries that the OECD will not have the ability to curb tax avoidance sufficiently to ensure that developing countries also receive their fair share of taxes on profits earned by multinationals in those countries. As indicated above, in addition to the massive outflow of tax revenue from the home countries of multinationals, developing countries are now losing more money because of tax avoidance schemes than they receive in foreign aid—in fact, far more. Given the OECD’s mission and membership, as well as the limited nature of its enforcement mechanisms, it is not surprising that critics are skeptical as to whether its well-informed proposals will ultimately translate into serious policy changes.


160. See Barbiere, supra note 159 (quoting the director of the German NGO, VENRO, to the effect that “for each euro invested, developing countries lose two euros to capital flight, particularly through the illegal transfer of business profits”). The article goes on to note that, according to UN estimates, such financial flows cost developing countries around 100 billion euros per year. Id.

161. See Simon Bowers, OECD Hopes Tax Reforms Will End Era of Aggressive Avoidance, THE GUARDIAN (Oct. 5, 2015, 1:19 PM), https://www.theguardian.com/business/2015/oct/05/oecd-hopes-reforms-will-end-era-of-aggressive-tax-avoidance. Due to the large, multinational nature of many of these corporations that pursue aggressive tax planning as a way of minimizing their total tax liability globally, critics believe that reforms will be difficult. Id. Countries also
C. RECENT DEVELOPMENTS IN THE EU: ARE THEY SERIOUS THIS TIME? A TAX AVOIDANCE CRISIS AND THE LONG SEARCH FOR A LEGAL THEORY

The European Commission has emphasized the vexed issue of corporate tax avoidance for many years. It has attempted to identify legal theories by which to get at the problem of member states that attract investment and jobs by offering (mainly US) multinational corporations special opportunities to avoid most or even all appropriate taxation. The fundamental roadblocks to this effort are: (1) EU legislation on the specific topic of direct taxation requires unanimous acceptance by all the member states, which by definition has been difficult to achieve and dominated by claims of national sovereignty; and (2) the difficulty posed by the fact that individual member state attempts to deal with corporate tax-avoiding behavior by companies have been hampered by case law of the Court of Justice of the EU, which has characterized such moves as being contrary to EU market rules. In other words, the Court of Justice of the European Union (CJEU) has disallowed attempts by certain member states to pass national legislation containing anti-avoidance rules for corporations to follow. The CJEU has unfortunately described member state attempts at self-help actions against the permissive rules of other member states as restrictive of free movement, and thus contrary to core principles in the EU treaties. Thus, the legal landscape facing the European Commission as it compete with each other on taxation in an effort to attract new business to their jurisdiction.

162. The EU Commission has had this issue on its radar screen since at least the late 1990s, although the problem has grown larger in recent years. See, e.g., Towards Tax Co-ordination in the European Union - A Package to Tackle Harmful Tax Competition, COM (1997) 495 final (Jan. 10, 1997).

163. See, e.g., id. app. para. E.


165. See Ross Fraser, "Reviewing the ECJ's Judgment in Cadbury Schweppes," INT’L LAW OFFICE (Oct. 20, 2006), http://www.internationallawoffice.com/Newsletters/Corporate-Tax/United-Kingdom/Herbert-Smith-LLP/Reviewing-the-ECJs-Judgment-in-Cadbury-Schweppes# (noting that in light of the Court’s rulings, “EU law precludes the United Kingdom from charging tax under the controlled foreign company provisions on the profits of non-UK subsidiaries based in the European Economic Area (EEA) unless the provisions contains a ‘carve out’ for transactions and structures which are not wholly artificial.”).

166. See Lilian V. Faulhaber, Sovereignty, Integration and Tax Avoidance in the European Union: Striking the Proper Balance, 48 COLUM. J. TRANSNAT'L L. 177 (2010) (describing in detail the severe restrictions placed by the CJEU on Member States attempting to enact national anti-avoidance rules). The Court has chosen to emphasize free movement market principles and has limited Member States to acting only when faced with “wholly artificial arrangements”. See id.
has tried to eliminate harmful tax competition has been difficult. In an
interesting legal development, the Commission has turned to the concept of
"state aids," or national subsidies, to attack member state behavior that
facilitates corporate tax dodging. It remains to be seen whether this
approach by the Commission will hold up if challenged by affected member
states before the CJEU.

The EU is known for its "social market"—a free market bounded by rules
and standards on consumer protection, social welfare and environmental
values. It is a highly legalistic system and has proven itself to be legally
imaginative and flexible over many decades. If any jurisdiction would seem
to have the capacity to confront and defeat rampant tax avoidance, it would
be the EU. And yet, legislative solutions have until recently eluded the
European Commission, in large part because, as explained above, EU-wide
legislation on matters of direct taxation requires unanimous agreement of all
EU member states. By definition, detrimental member state tax rate
competition favors the offending member state itself, at the expense of some
other country, whether in the EU or outside. Member states that are
heavily reliant on providing such "services" to corporations have been seen
as unlikely to vote in favor of legislation that would shut them down.

In light of recent adverse publicity on tax havens, and the high profile of
certain "tax avoidance facilitation" EU member states like Ireland,
Luxembourg, and the Netherlands, it appears that the European
Commission is finally making good on its multi-year threats to bring the full

§ II. Thus Member States legislating to prevent corporate tax dodging may not be restrained by
national legislation simply because the Member State in question sincerely wishes to prevent
such behavior, as long as the national measure constitutes a single market restriction. See id.

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168. Ireland has consistently claimed that it would bring a Court of Justice challenge to any
Commission decision that imposed back taxes on Apple. See, e.g., Michael Henning, Ireland's
Defence of Apple in EU State Aid Case is a Sham, FINFACTS (Dec. 15, 2015), http://www
tax-case-is-a-sham-430 (reviewing the special arrangements Ireland made with Apple, and
indicating that if the Commission found an illegal state aid, Ireland would be in the odd
position of challenging a decision that in fact yielded it billions of euros). The author calls this
"political Kabuki." Id. See also Paul Hannon, Ireland to Appeal EU's Apple Tax Ruling, WALL
356.

(C326).

170. Suzanne Lynch, EU Parliament Endorses Clampdown on Tax Avoidance, IRISH TIMES (June 8,
down-on-tax-avoidance-1.2677211.

171. See id.

172. See id. ("The European Parliament voted overwhelmingly in favour of a European
Commission anti-tax avoidance package on Wednesday, though most Irish MEPs abstained or
rejected the proposal.").
force of EU law to bear on the crisis of vanishing revenue.\(^\text{173}\) As we have seen, it is ironic that it is these EU countries—ostensibly progressive and public spirited—that have been the most egregious abusers of techniques to facilitate corporate tax evasion and avoidance. When obscure island locales offer such services, the effect may be important, but the evasion is too crude to be completely useful. EU member states, by contrast, have used their favored position within the European market, as well as their tax treaties with the United States, to assist multinational corporations in the most audacious kind of tax avoidance.\(^\text{174}\) In this sense, several EU member states have literally made the multinational dream come true.\(^\text{175}\)

As mentioned above, coming at the problem through ordinary legislative means has proven problematic, due to the EU's unanimity voting requirement in this subject matter area. Strong opposition was expressed to a recently drafted Anti-Avoidance Directive by the tax avoidance states. Indeed, up to ten EU member states vowed to oppose this proposed directive, based on the OECD BEPS principles.\(^\text{176}\) On the positive side of the ledger, the Commission continued to push for the adoption of the directive, to put in place clear, if not comprehensive, legislation outlawing the most egregious member state behavior in this realm.\(^\text{177}\) In the wake of the Brexit vote, and without Britain to lead the skeptical charge against corporate tax coordination, European Finance Ministers finally voted to accept the “Anti-Avoidance Directive.”\(^\text{178}\) Although Oxfam and other groups have criticized the directive as inadequate, it nevertheless reflects a step in developing an EU-wide policy against abusive tax accounting and

\(^{173}\) See EU Tax Avoidance Directive, supra note 84. The EU Tax Avoidance Directive “applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country.” Id. at art. 1.


\(^{175}\) See id.


member state facilitation of tax avoidance. The Directive covers a number of areas of concern, including so-called hybrid mismatches.

As mentioned above, the Commission has recently followed through in dealing with tax evasion via another legal approach: a state aids (unlawful national subsidies) theory. In the EU, state aids (essentially subsidies offered by national governments to companies within their territorial jurisdiction) must be passed through the Commission and approved. If a member state should offer such state aid and if it is later found to be contrary to the EU treaty (because of distortions caused to the EU market), the member state might have to retrieve the aid from the company in question. This is obviously painful and disruptive, and serves as a potentially powerful deterrent. Until recently, state aids rules had not been used to try and address the pan-European—indeed, global—issue of corporate tax avoidance. The EU commissioner in charge of Competition matters, Margarethe Vestager, has placed great emphasis on the corporate tax/competition law intersection, and moved forward creatively to apply the

179. See, e.g., Florian Oel, EU Anti-Tax Avoidance Package Will Fail to End the Era of Tax Havens, Warns Oxfam, OXFAM INT’L (Jan. 28, 2016), http://oxf.am/Znr9; see also, Bongaerts, Knijnenburg, & IJzerman, supra note 131 (describing criticism of the ATA Directive from tax practitioners of some EU member states).

180. The term “hybrid mismatches” refers to situations where:

there are differences in the legal characterization of payments or entities between EU member states. The rules would require that when an entity or instrument is classified differently in different member states, the treatment in the state in which the first deduction is claimed should be followed by the second state where either income is received or a second deduction is claimed.

See Bill Dodwell, European Commission Releases Proposed Anti-Tax Avoidance Package, DELOITTE EUROPEAN UNION TAX ALERT (Jan. 28, 2016), https://www2.deloitte.com/content/dam/De loitte/global/Documents/Tax/dttl-tax-alert-european-union-28-january-2016.pdf. Also covered in the Directive are interest restrictions, such that the deduction of financing costs should be restricted to a certain percentage of earnings. Further, controlled foreign company rules will be established for the member states, creating restrictions on the apportionment of profits among subsidiaries.


183. See Press Release, European Comm’n, Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands are Illegal Under EU State Aid Rules, IP/15/5880 (Oct. 21, 2015) (“[A]s a matter of principle, EU state aid rules require that incompatible state aid is recovered in order to reduce the distortion of competition created by the aid.”).

184. See DeNovio, Righini & Gibbs, supra note 182 (providing a practical background description of what multinational corporations should look for in the EU’s enhanced use of state aids law to confront tax avoidance effected through Member State “tax rulings”).
state aid concept to special taxation deals that involve the granting by member state governments of EU market-distorting “aids” in the form of tax revenue foregone.\footnote{185}

At the time of this writing, the European Commission has determined that Ireland broke EU rules on state aids in the deals made with Apple.\footnote{186} The Commission has also found tax deals made by the Belgian government with several large corporations to constitute illegal state aids.\footnote{187} As indicated, the “enforcement” aspect of this approach is that when illegal state aids are found, the member state government in question is required to collect the amount of the unlawful subsidy back from the company receiving the aid.\footnote{188} In the case of tax deals, collecting taxes foregone from a multinational corporation is obviously difficult, and resembles a financial penalty. This remedy is extremely effective, though, and unless the Commission decisions are overturned on appeal to the CJEU, is likely to prove one of the more innovative and effective techniques used to disincentivize corporate tax avoidance in the EU to date.\footnote{189}

As background, many voices in the EU have decried tax avoidance facilitation by member states over many years. For a long time, Ireland was the most obvious source of the problem, drawing in American multinationals by offering low rates of tax and assistance in avoiding even that low level of tax.\footnote{190} Even though the EU reined in the most clearly discriminatory aspects of the Irish schemes in 2014, the European Commission struggled to find a way of inducing Ireland to separate its development policy from over-

\footnote{185. See Nicholas Hirst, \textit{Vestager Hits Fiat and Starbucks With Tax Claw-Back}, \textit{POLITICO} (Oct. 21, 2015), http://www.politico.eu/article/vestager-fiat-starbucks-taxation-claw-back-netherlands-state-aid/ (noting that her state aids rulings “represent an unprecedented attack on the ability of certain European countries, notably Luxembourg and Ireland, to market themselves as tax havens to corporations”).}


\footnote{187. See Press Release, European Comm’n, State Aid: Commission Concludes Belgian “Excess Profit” Tax Scheme Illegal; Around 700 Million Euros to be Recovered From 35 Multinational Companies, IP/16/42 (Jan. 11, 2016) (referring to the fact that this scheme had allowed certain multinational companies to pay substantially less tax than would otherwise have been due, on the basis of Belgian state rulings providing the companies with these special rates).}

\footnote{188. Id.}

\footnote{189. Id.}

\footnote{190. Ireland has relied on both a very low absolute rate of corporate tax (in recent years, 12.5 percent) and further “services” to multinational corporations in the form of special schemes and stratagems that allow the companies to avoid paying little or no taxes on certain income. See Stephen Castle \& Mark Scott, \textit{Ireland to Phase Out ‘Double Irish’ Tax Break Used by Tech Giants}, \textit{N.Y. TIMES} at 1, 4 (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/business/international/ireland-to-phase-out-tax-advantage-used-by-technology-firms.html?r=0. Ireland has long argued that because the EU treaty requires EU legislation in the area of direct taxation to be adopted unanimously, it was acting within its sovereign rights when serving U.S. multinational corporations in this manner. Id.}
reliance on tax schemes.191 The cleanest and simplest solution would obviously be legislatively-based coordination of corporate tax rates at EU level, or at least strong member state coordination in levels of corporate taxation. This long remained beyond the jurisdictional reach of the EU, however, because, as already indicated, direct taxation is one of the few Treaty areas still requiring unanimous decision-making on the part of all EU member states. In particular, Ireland and Luxembourg took leading roles in defending this “tax competition” as a key aspect of EU “subsidiarity”—with the UK, the Netherlands and the Channel Islands right behind.192 It seems that with Britain out of the legislative picture post-Brexit, there might be room for faster progress on the corporate tax front.

In fact, it seems that the Commission has managed to seize the moment and successfully pushed for a coordinated approach to corporate tax collection across the EU; however, there is as yet no harmonization of rates, nor even the establishment of a tax rate floor.193 Especially in light of recent threats to Eurozone unity during the Greek financial crisis, it remains to be seen whether the EU institutions will expend the political capital necessary to either float treaty changes, or go for “enhanced cooperation” on this issue with a select group of EU member countries.194

A key element, as reflected to some extent in the Anti-Avoidance Directive, will be the finalization of a CCTB mechanism, designed to track and accurately allocate the profits of multinational corporations according to where the profits were actually generated within the EU, as part of the Commission’s long-term plan for corporate tax reform.195 This might well

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191. See id. at 2 (noting that both the EU and the Obama administration had put pressure on Ireland to eliminate the so-called “double Irish” tax break, under which “corporations with operations in Ireland ... make royalty payments for intellectual property to a separate Irish-registered subsidiary. That subsidiary, though incorporated in Ireland, typically has its home in a country that has no corporate income tax”). Ireland still hopes to replace this scheme with another form of intellectual property-based loophole, though the EU may forge ahead with its long-term plan to create some kind of floor on corporate tax rates.

192. Apart from the affected member states, corporate voices have been strong in their resistance to the idea of EU-wide corporate tax coordination. See, e.g., Giacomo Lev Mannheimer, There’s No Such Thing as ‘Harmful’ Tax Competition in the EU, CAPX (May 4, 2016), http://capx.co/theres-no-such-thing-as-harmful-tax-competition-in-the-eu/ (arguing that tax coordination would interfere unfairly in individual member states’ autonomy).


194. See TFEU, supra note 82, at art. 326-88; see also Treaty of Lisbon, supra note 164, at art. 20.

195. In an effort to combat the use of base erosion and profit shifting methods by multinational corporations, the EU has proposed making the CCTB measures in their Anti-Avoidance Directive from January 2016 a mandatory requirement for all multinational companies. See The Outlook for Global Tax Policy, EY (2016), http://www.ey.com/Publication/vwLUAssets/ey-the-outlook-for-global-tax-policy-in-2016/$FILE/ey-the-outlook-for-global-tax-policy-in-2016.pdf (describing general changes in corporate tax policy worldwide in 2016). See also Leaked EU directive makes CCTB/CCCTB Tax Scheme mandatory for large multinationals, MNE TAX
put an end to companies funneling profits through low or no tax countries within the EU. This hard-edged solution has been strongly resisted by EU member countries that derive a large share of their jobs and revenue from the very multinationals that would be disadvantaged by any such changes—namely Ireland, the (at least pre-Brexit) UK, Luxembourg and the Netherlands. Ireland especially has continued to build essentially all of its national economic policy around providing tax avoidance strategies to marquee level multinational corporations. Ireland may prove to be the biggest loser from the Commission’s long awaited drive to bring this issue into legislative form.

On the state aids front, it is heartening that the European Commission has recently reverted to “thinking like a (tax) lawyer,” and has tried to find a strong legal rationale for attacking member state tax arrangements that allow multinational corporations to avoid appropriate taxes. The state aids approach is an innovative, though risky, strategy, as it depends upon the CJEU ultimately agreeing with the Commission that a particular type of tax agreement (“sweetheart deal”) between an EU member state and a multinational corporation is in fact a “state aid,” or unlawful national subsidy to the industry. Should such a legal challenge not go the Commission’s way, it would constitute a major setback to the entire European project. Should the state aids approach survive legal challenge, the prospect of major tax repayment could pave the way to significant changes in the way member state governments interact with multinational investors—companies whose capital these states are seeking to attract.
D. The View from the U.S.: Any Commitment to Closing "Loopholes"?

U.S.-based corporations have undoubtedly learned a great deal over recent decades on the subject of how to avoid paying "normal" levels of tax to the American government—or indeed, to any government. The percentage of government revenue attributable to corporate taxation has plummeted over time, and the elaborate devices relied upon by U.S. companies to avoid and evade U.S. taxes are well understood. Thus, it is not surprising that there has been a great deal of discussion at the political level about how to ensure that U.S. companies pay their "fair share" of taxes. It is also unsurprising that Congress has failed to take meaningful action to prevent corporate tax-avoiding behavior, and that the problem continues to trouble the American public year after year, and revelation after revelation.

Important aspects of the U.S. corporate tax scene are that U.S. corporate taxes are "worldwide," rather than territorial.\(^\text{199}\) This means that profits gained by U.S. firms abroad are subject to U.S. taxes, rather than just on profits derived within the United States.\(^\text{200}\) (This is not the case in most other jurisdictions.) These taxes may be "deferred" until the profits are repatriated, creating powerful incentives for U.S. firms to leave the profits parked offshore.\(^\text{201}\) Tax treaties with other countries confront the problem of double taxation, allowing U.S. persons to deduct taxes paid in another jurisdiction from U.S. taxes owed.

In addition, U.S. corporate taxes are relatively high at 35 percent.\(^\text{202}\) That being said, most large corporations do not pay anything like this level of taxation, depending on their ability to manipulate the rules on corporate nationality.\(^\text{203}\) As this article has described above, corporate accountants have developed ways to attribute profits to places where taxes are extremely low or non-existent, even if (as is usually the case) little economic activity actually occurred there.

So the situation in the United States is that Democratic members of Congress have pushed forward legislation that will plug the many loopholes in the U.S. tax code, and bring back honest levels of corporate tax revenue to the United States. These initiatives are blocked in turn by Republican

\(^{199}\) The more pro-corporate voices in the U.S. favor changing the U.S. over to a territorial system, although others argue that this would further encourage an exodus of corporations from the U.S. See Curtis S. Dubay, A Territorial System Would Create Jobs and Raise Wages for US Workers, HERITAGE FOUNDATION (Sept. 12, 2013), http://www.heritage.org/research/reports/2013/09/a-territorial-tax-system-would-create-jobs-and-raise-wages-for-us-workers.

\(^{200}\) Id.


\(^{202}\) See id. at 2.

\(^{203}\) See id.
members of Congress, on the grounds that there must first be “fundamental reform” of the U.S. tax code, and a change in overall corporate tax orientation. Fundamental reform is generally understood to refer to a switch to territorial, rather than worldwide, taxation and a lowering of the rate of corporate taxation. Other commentators counter that a changeover to territorial taxation would incentivize large numbers of U.S. corporations in moving abroad to avoid U.S. taxes. The argument is also made that the U.S. corporate tax rate is not in fact all that high, and that the real rate paid by U.S. companies is far lower, given all the deductions available.

In January 2015, Democrats and Republicans in both the House of Representatives and Senate introduced a bill called the “Stop Tax Haven Abuse Act.” While the bill has had its critics, it did try to address some of the principal aspects of tax avoidance by U.S. corporations, namely by attacking “inversions” that allow U.S. corporations to become foreign entities through being purchased by foreign firms; limiting the amount of debt interest that can be deducted from tax liability, a practice known as “earnings stripping”; requiring country-by-country reporting of earnings by large corporations; and making it much harder to shift profits from a high-tax to a low-tax or no-tax jurisdiction. The bill’s provisions would go a long way towards weakening the tax avoidance stratagems relied on by U.S. corporations and their accountants. The bill, however, has not moved forward in the legislative process.

It would be unfair to say that the Obama Administration has not been supportive of such Congressional initiatives. It is certainly the case, however, that the Administration has not been sufficiently supportive. Many in Congress have also been resistant to changing the rules under which their corporate allies operate. This article has argued that government policy is increasingly dominated by corporate interests, and maintaining a low-tax and even no-tax environment is an item high on the wish list of all major U.S. corporations. Despite the high profile, charitable


206. Id. at sec. 401.


209. See id. (expressing the view that for whatever reason, the White House has not put sufficient energy into the corporate tax avoidance issue, although it has been energetic in its approach to tax avoidance by wealthy individuals). See also Charles Davidson, Cleaning Up the Financial World, HUDSON INST. (June 28, 2016), http://www.hudson.org/research/12606-cleaning-up-the-financial-world.
giving done by many corporations, this largesse pales in comparison with the amount of money being saved through tax-avoiding strategies.

The U.S. media reported widely on the phenomenon of "inversions" during 2014-2015.210 Because of several inversions by large and prominent U.S. corporations, inversions became the public face of corporate tax avoidance for a period of time.211 This attention was aided by the fact that the U.S. corporations in question actually changed their nationality, thus leading to charges of "un-American" corporate behavior, which in turn, naturally became a focus for public outrage.212 These inversions, a process allowing U.S. corporations to change corporate nationality by being bought out by foreign companies, were of course motivated by tax considerations.213 As U.S. corporate tax rates are high by international standards, the idea is that U.S. based multinationals can gain tax advantages by no longer being "U.S." corporations.214

During 2015-2016, President Obama and Treasury Secretary Jack Lew sounded the alarm on corporate inversions, denouncing them and vowing to rein them in.215 While unable to bring about any legislative action in Congress, the President took a number of steps through executive powers available to him, adopting rules that would make inversions more difficult, even if not eliminating them for all time.216 The Treasury Department adopted temporary regulations to hinder U.S. firms from shifting their assets and profits to lower tax jurisdictions through the inversion process.217 Exactly why the inversion phenomenon took center stage, as opposed to the larger story of U.S. corporations and their multi-faceted quest to avoid taxes—is unclear. President Obama famously called these inversions "unpatriotic" and took steps at the executive level to make them less advantageous for U.S. corporations.218

211. See id.
212. See id. at 1357-58.
213. See id. at 1356.
214. See id. at 1359, 1361.
216. Treasury has urged Congress to take permanent steps to prevent inversions by reducing the tax advantages companies derive from inversions. Id. (describing the most recent in a series of temporary regulations introduced by the Treasury Department and Internal revenue Service, aimed at making it more difficult for companies to benefit from inversions).
217. See generally id. This document provides a description of the proposed regulations.
218. The business-oriented press in the United States has responded to President Obama's suggestion that inversions are "unpatriotic" with the argument that the high US corporate tax rates are outliers within the OECD, and that if US companies can legally pursue inversions, and the tax rates remain high as they are, that inversions will continue to proliferate. See Andrew Osterland, Are corporate tax inversions 'unpatriotic'?; CRANs NEW YORK BUSinesS (Sept. 29, 2015), http://www.cranisnewyork.com/article/20150929/FINANCE/150929855?template=print.
At the same time, the role of the U.S. in defending the interests of tax-avoiding U.S. companies is an ambiguous one. The European Commission, at the time of this writing, has handed down a major decision to the effect that Irish tax deals with Apple constituted improper state aids, and that Apple will be required to "pay back" a certain amount of the taxes foregone.219 The Obama administration tried in vain to convince the EU’s Commissioner for Competition, Margarethe Vestager, not to find Ireland in violation, and to stop her supposedly "discriminatory" pursuit of U.S. companies over their tax affairs in Europe.220 If the real goal of the Obama administration was to progress toward a point in time when the largest U.S. companies understand that they must pay a reasonable level of taxes on their profits, and in places where those profits are derived, it is difficult to understand the position of Secretary Lew in the Apple Corporation state aids matter. Surely such a penalty, although painful for Apple in the short term, would teach a valuable lesson on the new global approach to taxation. On the other hand, if the Obama administration is less than serious about genuine reform in the corporate tax realm, its repeated exhortations to the European Commission on corporate America’s behalf make a good deal more sense.

E. THE "INDEPENDENT COMMISSION FOR THE REFORM OF INTERNATIONAL CORPORATE TAXATION": PIE IN THE SKY? OR ROADMAP TO MAKING REVENUE STARVATION A THING OF THE PAST?

Despite the highly technical nature of the corporate tax avoidance problem (if one looks primarily at the manner in which companies are structuring themselves to avoid tax), it is not accurate to say that the global public lacks access to data on the problem. It is well established, most dramatically since the LuxLeaks and Panama Papers revelations, that major global corporations are paying only a tiny fraction of what they "owe" the public good in various countries, causing severe revenue depletion and contributing to a crisis of enforced austerity. The "leaks" phenomena were most useful for what they confirmed by way of cold, hard facts.

It is well known, and also well described by specialist scholars, that the largest companies have armies of accountants who assist them in moving their money from one jurisdiction to another, and often to no actual jurisdiction at all, creating a fictional financial world in which no taxes or

220. See Duncan Robinson, Jack Lew Accuses Brussels of Bias Against US Companies, FIN. TIMES (Feb. 11, 2016), https://www.ft.com/content/a12074e0-d0d6-11e5-92a1-c5e23ef99e77.
extremely low taxes only, are owed. As mentioned above, many national governments term this "healthy tax competition," and the companies themselves, in various hearings, insist that they are only doing what is "allowed under the law." That there is a serious legal gap, and that this could be solved in the near term, is abundantly clear. But this article presents the argument that many, perhaps most, national governments are attempting to confuse the public by promoting reforms of a weak and ineffective nature, as opposed to the clear and meaningful legislative solutions of the type set out, for instance, by the new "Independent Commission for the Reform of International Corporation Taxation."

The Independent Commission approaches the problem of corporate tax avoidance in a manner that is comprehensive and idealistic. It treats this massive global problem as one that can be solved with the right policy interventions. Not surprisingly, the Commission has been criticized on the grounds that its recommendations are very unlikely to be implemented by governments. The Commission's "Declaration" sets out a Statement of Principles that makes the overall point that multinationals should be taxed as single firms doing business across international borders. The principles also include a commitment to ending "tax competition" by establishing a minimum corporate tax rate. The Statement recognizes that the old system of corporate taxation has become obsolete and demands real reform, along with meaningful transparency and enforcement.

A main driver behind the creation of the Independent Commission is economist Joseph Stiglitz, who has repeatedly made the point that the current system of international corporate taxation cannot be justified on any rational grounds. The Nobel Prize-winning Stiglitz has repeatedly called for a complete overhaul of the world's outmoded system of taxation.


224. See ICRICT Declaration, supra note 222, at 1.

225. See ICRICT Declaration, supra note 222, at 1.

226. See id. at 3.

227. See id. at 1, 6-8. 12.

228. See Ben Walsh, The International Tax System is 'Repulsive and Inequitable.' Here's a Way to Fix It, HUFFINGTON POST (Aug. 20, 2015), http://www.huffingtonpost.com/entry/multination al-corporations-taxes_us_55d4baede4b055a6dab265d9 ("If you had to argue on principle in
IV. Conclusion: A Staggering Problem, the Need for a Courageous Solution

Expert (but conservative) estimates of the amount of money parked in offshore tax avoidance schemes reach to at least twenty to thirty trillion dollars. This is by any definition an unimaginable figure and a significant percentage of the world’s total capital assets. Studies put the number of offshore “secrecy jurisdictions” to be around eighty. These practices are no longer confined to the margins, but constitute normal, predictable behavior on the part of large corporations, as well as the wealthiest individuals. Full payment of taxes is now characteristic only of the “immobile” classes—namely, people who work in ordinary jobs, with income that is clearly traceable by bureaucratic means. More than two trillion dollars in U.S. corporate profits alone are believed to be stashed away in offshore vehicles. This translates into specific losses for the national treasury in many countries, including losses of well over 300 billion dollars per year in the United States. It really does not matter what kinds of economic or non-economic “human rights” are articulated, nor what national laws purporting to reduce inequality are passed, given the enormous level of tax avoidance: the upshot is that national governments have lost and are losing available funds at a rate that far outpaces any possible public policies in favor of human development. No Millennium Goals or Human Development Index can compete with this striking failure to get hold of the runaway phenomenon of corporate (and individual) tax avoidance.

The amount of money being set aside untaxed via all the existing schemes and centers dwarfs foreign aid, social welfare payments or other public interest or developmentally-oriented money transfers. Societies across the favor of the current system, referred to as ‘transfer pricing’, over treating global companies as one entity and taxing them at one rate, ‘you’d be laughed out of court’, Stiglitz says."


230. Id. at 12 (providing a description of the 80 largest tax havens). See Directorate Gen. for Internal Policies & Budgetary Affairs, Study on European Initiatives on Eliminating Tax Havens and Offshore Financial Transactions and the Impact of these Constructions on the Union’s Own Resources and Budget, at 49, IP/D/CONT/IC/2012-071 (2013) (stating that the number of “secrecy jurisdictions” is around 80).


world have become impoverished for lack of investment capital, largely because of the loose coalition of actors that has enabled corporations and wealthy individuals in their tax avoidance efforts.

Developing countries are especially hard hit when multinational corporations operating within their borders rely on elaborate tax avoidance mechanisms that rake profits out of the country.\textsuperscript{234} While public attention tends to focus on issues such as development aid and philanthropic generosity, in fact, developing countries are losing hundreds of billions of dollars in revenue every year as a direct result of tax avoidance schemes availed of by corporate investors.\textsuperscript{235} These practices could not exist if national governments in capital exporting countries seriously addressed the corporate taxation crisis and consequent revenue starvation. The newly-created Independent Commission for the Reform of International Corporate Taxation has stated the problem this way: "Abusive multinational corporate tax practices are a form of corruption that weakens society and demands urgent action."\textsuperscript{236} Such a formulation re-characterizes the issue as one of widespread abuse, moving us away from ordinary ideas of "tax planning" and even the understated "tax avoidance." The increasing normalcy of heavy reliance on tax havens is symptomatic of public-private collusion and the rise of the autonomous, de-nationalized corporation.

This article cannot fully address the many types of tax havens, the legislative weaknesses that allow for tax avoidance and evasion, or the complex machinations of tax lawyers and accountants. The basic contours of tax havens have been well outlined in the popular press and well documented in the academic literature. As has been stated above, the extraordinary feature of contemporary economic life on the global stage is that national governments have gone so far to facilitate tax dodging, a dramatic instance of governments working on behalf of the mega-wealthy and multinational corporations, with seemingly no regard for the obvious needs of ordinary people in the form infrastructural investments, education, social welfare, health, and other public goods.

As described above, a main pillar in the policy recommendations of the Independent Commission is the legislatively-based elimination of artificial segmentation of multinational corporations, and a call to return to a vision of the large company as one entity, with profits derived and properly taxable in the different jurisdictions of its operation.\textsuperscript{237} The Commission has insisted that the only fair solution is to have appropriate taxes paid wherever

\textsuperscript{Mbeki as stating that "an estimated $50 billion a year seeps out of Africa through illicit capital outflows, which is twice as much as the amount of foreign aid the continent received each year."}

\textsuperscript{234. See Bearak, supra note 97 (noting that African governments lose at least 30 to 60 billion dollars per year to tax evasion, with some estimates closer to 1 trillion dollars).}

\textsuperscript{235. Wayne, supra note 233.}

\textsuperscript{236. See ICRICT Declaration, supra note 222, at Statement of Principles.}

\textsuperscript{237. Id.}
the activities are performed and the profits derived. This concept is very similar in nature to what has long been proposed by the European Commission in the idea of CCCTB. As things currently stand, multinational corporations essentially choose the jurisdiction they wish to pay taxes in—and that will always, not surprisingly, be the jurisdiction with corporation tax levels closest to zero. As this article has made clear, there is an increasing number of countries willing and eager to assist companies in the techniques of tax evasion, and in this race to the bottom, national and international regulators have held back on plans to put an end to these unjust corporate prerogatives.

In the end, even if a comprehensive remedy includes some type of specialized global enforcement body, there will be inevitable problems with its enforcement powers. The OECD is likely too voluntary and too wealthy-country oriented to get the task done. The EU could act effectively, but is in a very precarious state politically, especially after the Brexit vote, and has a Commission President who was, as the Prime Minister of Luxembourg, identified with many of the most outrageous forms of corporate tax evasion in Europe.

As described above, members of the U.S. Congress have proposed the “Schumer plan,” which is already being panned as a false start, without the capacity to seriously undermine tax avoidance by U.S. multinational corporations. It remains to be seen, of course, whether a new American administration will take on the issue of corporate tax avoidance and evasion with any seriousness. Despite the relentless research and publishing of citizen watchdog groups in all parts of the world, their ultimate influence on public policy must still be characterized as marginal.

Our collective attention is often misdirected away from the legal underpinnings of economic injustice, the symptoms of which are poverty, underdevelopment, and under-investment. Corporate taxation is not a technical issue best left to specialists; many of these justice-related issues can

238. Id.
239. The article states that the CCCTB:
aggregates related EU companies into a single, consolidated tax return for all those entities. The EU group net taxable income is then apportioned back out to each entity and country in proportion to the relative assets and other economic factors within those locations. Thus, the CCCTB is a system of formulary apportionment which abandons the existing arm's length standard of treating each inter-company transaction separately.

See Ryan, supra note 133.
241. See Bob McIntyre, Bipartisan Senate Plan Confuses Real Tax Reform with Tax Cuts for Multinational Corporations, Tax Just. Blog (July 8, 2015), http://www.taxjusticeblog.org/archive/2015/07/bipartisan_senate_plan_conflat.php#.V4-YdpkiUk (making the point that under this plan—which in fact remains stalled in Congress—large companies can simply find new ways to avoid paying taxes).
be directly linked with the failure of corporations to pay their fair and reasonable share of taxes. Despite sporadic flare-ups of media attention, one could not say that global corporate tax avoidance has received anything like the sustained analytical treatment it deserves, so as to educate and inform the public on the basic reasons for revenue starvation. As of this writing, it is simply not clear whether steps taken by the OECD, the EU or the United States will bear fruit, or whether mass-scale corporate tax avoidance will become a permanent, ingrained feature of our increasingly unequal world.