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International Tax and Corporate Discretion

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Corporate social responsibility ("CSR") has a tax problem. The field encourages companies to do more for society than the minimum that is legally required. But, when it comes to companies avoiding tax, CSR has very little to say. Activists even allege that CSR merely distracts from companies' much costlier tax minimization strategies that deprive the state of needed revenue and thereby undercut the state's capacity to perform these very same functions.

Though CSR has historically sidestepped questions of tax, this is beginning to change. Some major companies now discuss tax as a part of their corporate sustainability reporting. And CSR standard setters have started to consider including tax as a factor in their evaluation of corporate behavior. At the same time, countries around the world are starting to implement the Organization for Economic Cooperation and Development ("OECD") and G20 plan for a Global Minimum Tax. This program aims to enforce a minimum tax rate for large multinational corporations, thereby reducing incentives for tax arbitrage. Though this focus on tightening the rules regarding how much tax business entities owe is significant, companies will still retain much discretion as to where they pay tax.

This Article argues that corporate discretion regarding where to pay tax is a pressing issue about which a more robust version of CSR may provide important guidance. It proposes that future dialogue between tax and CSR should focus not just on how much companies pay but also on where companies pay tax. The Article articulates how considerations of economic development, human rights, and environmental protection may inform the exercise of corporate tax discretion, and it examines the important ramifications of these decisions for global inequality.

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Introduction

Without much fanfare, 3M began to discuss tax in its corporate social responsibility ("CSR") report in 2021.[1] This move broke years of relative silence regarding the social impact of the multinational manufacturing

1. 3M, Advancing our Impact: 2021 Sustainability Report 85–86 (2021), https://ungc-production.s3.us-west-2.amazonaws.com/attachments/cop_2021/497972/original/3M%20Sustainability%20Report%202021.pdf?1621970368 [https://perma.cc/GV2W-K973].

This practice continued with 3M's 2022 and 2023 Sustainability Reports. *See* 3M, Advancing our Impact: 2023 Global Impact Report 39–40 (2023), https://multimedia.3m.com/mws/media/2292786O/3m-2023-global-impact-report.pdf [https://perma.cc/M5NE-KR52]; 3M, Advancing our Impact: 2022 Global Impact Report 72–73 (2022), https://sustainabilityreports.com/reports/3m-company-2022-global-impact-report-pdf/ [https://perma.cc/42FW-WQB8]. 3M also maintains an archive of its Sustainability Reports back to 2014. *See Our Global Impact – Sustainability/ESG*, 3M, https://www.3m.com/3M/en_US/sustainability-us/reports/ [https://perma.cc/WH7F-LAWU] (last visited Jan 25, 2024).

giant's tax planning.[2] 3M pledged that its tax strategy would be guided not just by the shareholder value maximization model long expected of modern corporations, but that going forward its tax policy would be oriented by its commitment to "[b]e respectful," "[b]e good," and "[b]e fair."[3]

That a company with a large physical footprint like 3M might announce its intention to take a more socially responsible approach to tax may not come entirely as a surprise. Such conglomerates often face express and implied pressures to conform with the tax expectations of the state entities in whose territory they operate because the prospect of moving operations swiftly is neither easy nor inexpensive.[4] Yet, something other than its worldwide physical footprint seems to have spurred the company to begin thinking of tax as an aspect of its corporate sustainability strategy between its 2020 and 2021 reports.

Indeed, 3M is not alone in beginning to frame its tax planning as an important aspect of its social responsibility commitments. The world's largest custodian bank, BNY, declared in its 2021 Global Tax Strategy that "[a]s part of [its] overall environmental, social and governance ("ESG") strategy, we are committed to acting with integrity in all tax matters and maintaining a transparent tax practice."[5] The Bank even

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2. *See* 3M, IMPROVING EVERY LIFE: 2020 SUSTAINABILITY REPORT (2020), https://multimedia.3m.com/mws/media/1836747O/2020-sustainability-report.pdf [https://perma.cc/RD47-9DW9] (containing only brief mention of the Company's 'provision for income taxes' without any connection to social impact and disclosing that the Company's provision for income tax declined 31.1% between 2018–2019); 3M, IMPROVING EVERY LIFE: 2019 SUSTAINABILITY REPORT 76, 95, 252 (2019), https://multimedia.3m.com/mws/media/1691941O/2019-sustainability-report.pdf [https://perma.cc/822G-WS2Y] (containing brief discussion of tax only in so far as it related to offering domestic partner benefits to employees, tax reform as a lobbying activity for the company in 2018, and an observation noting that the company's provision of funds to pay income tax declined 19.2% over the period 2014-2018).

3. 3M, ADVANCING OUR IMPACT: 2021 SUSTAINABILITY REPORT, *supra* note 1, at 85.

4. Michael Keen & Peter Mullins, *International Corporate Taxation and the Extractive Industries: Principles, Practice, Problems*, *in* INTERNATIONAL TAXATION AND THE EXTRACTIVE INDUSTRIES 11, 13 (Philip Daniel et al. eds., 2017) (observing that transactions "relate[d] to intangible assets of various kinds—patents, trademarks, and other intellectual property (IP) . . . can be much more easily relocated than can the bricks-and-mortar facilities of the world for which the current [international tax] framework was initially built").

5. BNY MELLON, BNY MELLON GLOBAL TAX STRATEGY: FINANCIAL YEAR ENDED 31 DECEMBER 2021 (2022), https://www.bnymellon.com/content/dam/bnymellon/documents/pdf/csr/bny-mellon-global-tax-strategy-2021.pdf.coredownload.pdf [https://perma.cc/A467-CM6D].

endorsed ongoing international measures to set a Global Minimum Tax for companies, pronouncing that "[w]e support the various global tax initiatives such as OECD international tax reform work . . . as part of our ESG strategy."[6]

In terms of explicitly integrating tax and CSR, 3M and BNY remain outliers. The CEO members of the Business Roundtable famously declared in 2019 that "we commit to . . . supporting the communities in which we work," and they "urge[d] leading investors to support companies that build long-term value by investing in their . . . communities."[7] Yet, the vast majority of companies led by Roundtable members still offer very little guidance regarding how tax fits within their collective understanding of social responsibility or community investment. This has been the case for some time. In a 2000 study produced by the Organization for Economic Co-operation and Development ("OECD"), researchers found that of 246 corporate codes of conduct analyzed, "[t]he least frequently mentioned issue area is taxation, which appears in only one code."[8]

Potential connections between CSR and tax are also regularly neglected in international lawmaking efforts. There are various important international legal projects either ongoing or recently concluded to formalize business obligations with respect to human rights, the environment, and economic development. Yet, each seems almost entirely to have overlooked corporate tax planning strategies as an integral component of states' ability to attain these objectives.[9]

Similarly, the OECD has proposed and the G20 recently endorsed the adoption of a Global Minimum Tax.[10] The Global Minimum Tax is to

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6. *Id.* at 3.

7. *Statement on the Purpose of a Corporation*, Bus. Roundtable, https://www.businessroundtable.org/ourcommitment [https://perma.cc/3GZ3-AX3C] (last visited July 28, 2023); *see also* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91, 124 (2020) (noting that "[t]he BRT [Business Roundtable] statement was widely viewed by many observers as a major milestone and a significant turning point for corporate America").

8. Org. for Econ. Coop. and Dev. [OECD] Working Party of the Trade Comm., *Codes of Conduct: An Expanded Review of their Contents*, at 10, OECD Doc. TD/TC/WP(99)56/FINAL (June 9, 2000); *see also* Rhys Jenkins & Peter Newell, *CSR, Tax and Development*, 34 Third World Q. 378, 389 (2013) (asserting that "[e]ven companies that are regarded as leaders in terms of CSR rarely give any attention to taxation as a CSR issue").

9. *See infra* Part II.

10. *See* Org. for Econ. Coop. and Dev. [OECD], *Tax Challenges Arising from Digitalisation of the Economy - Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive*

be set at 15%, supposedly to render largely moot the incentive structure that has previously fueled tax competition among states.[11] Under the current plan, if a state offers to tax below this 15% floor, the state of the ultimate parent company can collect a top-up tax equivalent to the tax that the first state declined.[12] But the project has very little to say about how CSR might guide corporations in exercising discretion regarding tax once these OECD measures are fully implemented.

Perhaps this apparent gulf between CSR and tax is not entirely surprising. It has often been suggested that CSR involves near total discretion for private entities, and tax might easily be thought to offer very little.[13] However, as inventive tax planning has enabled seemingly profitable companies to pay little or nothing in tax, these practices have also illustrated that companies navigate an array of tax choices.[14]

Framework on BEPS, OECD Publishing ISSN: 23132612 (Dec. 20, 2021) [hereinafter OECD, Pillar Two].

11. *See, e.g.*, *Global Anti-Base Erosion Model Rules (Pillar Two): Frequently Asked Questions*, OECD (June 1, 2024), https://www.oecd.org/tax/beps/faqs-on-model-globe-rules.pdf [https://perma.cc/E9PQ-ETGA] (arguing that "[h]aving a common, consistent effective tax rate test as the foundation of the global minimum tax rules ensures a level playing field and puts a floor under tax competition" and asserting that "[t]he GloBE rules are expected to reduce pressure on governments to offer wasteful tax incentives and tax holidays . . . ."); Leigh Thomas & Andrea Shalal, *OECD Offers Final Guidance for Global Minimum Corporate Tax*, REUTERS (Feb. 2, 2023), https://www.reuters.com/markets/oecd-offers-final-guidance-global-minimum-corporate-tax-2023-02-02/ [https://perma.cc/4LED-ZB7M] (quoting, U.S. Assistant Secretary of the Treasury for Tax Policy, Lily Batchelder, who stated that "[t]he continued progress in implementing the global minimum tax represents another step in levelling the playing field for U.S. businesses . . . .").

12. *See* Ruth Mason, *A Wrench in GLOBE's Diabolical Machinery*, 107 TAX NOTES INT'L 1391, 1393 (2022).

13. *See, e.g.*, Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1190 (2022) (observing that "credible commitment is particularly necessary in the corporate arena because of the considerable discretion afforded to actors within that area" and that "[o]ne of the core tenets of corporate law is that directors and officers have broad discretion to manage the affairs of the corporation"); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 444 (2001) (noting a prevailing view in the United States from the 1930s–1960s that "extolled the virtues of granting substantial discretion to the managers of large business corporations" so that "professional corporate managers could serve as disinterested technocratic fiduciaries who would guide corporations to perform in ways that would serve the general public interest;" and observing that, "[t]he corporate social responsibility literature of the 1950s can be seen as an embodiment of these views").

14. *See, e.g.*, Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General*

Aggressive tax planning schemes have long attracted the ire of activists.[15] So far, though, the legal responses through which this outrage has been channeled have focused on states as the actors tasked either with closing loopholes to defend against corporate exploitation or on prohibiting states from offering enticements to companies via tax incentives.[16]

But things are changing. Leading CSR ratings agencies and professional standard-setting bodies have begun to include or are currently discussing including tax compliance in their criteria for ranking corporate sustainability and guiding business conduct with respect to social impact. In 2019, the Global Sustainability Standards Board adopted GRI 207 to "[set] out reporting requirements on the topic of tax,"[17] and the members of the World Economic Forum agreed at their annual meeting in Davos in 2020 to include total tax paid as a factor in the Stakeholder Capitalism Metrics.[18] In December 2023, the Financial Accounting Standards Board

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Corporation Law, 50 Wake Forest L. Rev. 761, 790 (2015) (observing that "[u]nder the law as it exists, tax arbitrage is a permissible way to reduce the corporate tax bill and further stockholder welfare" and that "[f]or those who decry this reality, the solution must come from other bodies of positive law that constrain corporate behavior . . . .").

15. *See, e.g.*, Glob. All. for Tax Just. et al., The State of Tax Justice 2021 6 (2021), https://taxjustice.net/wp-content/uploads/2021/11/State_of_Tax_Justice_Report_2021_ENGLISH.pdf [https://perma.cc/5SN7-N7ZP] (alleging that corporate tax abuse is "causing governments around the world to lose US$312 billion a year in direct tax revenue"); ActionAid, Mission Recovery: How Big Tech's Tax Bill Could Kickstart a Fairer Economy 3 (2021), https://actionaid.org/sites/default/files/publications/Mission%20Recovery_ActionAid%20Tax%20Report%202021.pdf [https://perma.cc/2FHJ-C79B] (alleging that "G20 countries may be losing as much as $32bn USD annual in taxes from just five of the world's largest tech companies. That could have paid for a full two-dose Covid-19 vaccination for every human on earth."); *Inequality and Poverty: The Hidden Costs of Tax Dodging*, Oxfam Int'l, https://www.oxfam.org/en/inequality-and-poverty-hidden-costs-tax-dodging [https://perma.cc/36GU-DMX7] (asserting that "[c]orporate tax dodging costs poor countries at least $100 billion every year. This is enough money to provide an education for 124 million children and prevent the deaths of almost eight million mothers, babies and children a year").

16. *See, e.g.*, G.A. Res. 76/196, ¶ 17 (Dec. 17, 2021).

17. Glob. Sustainability Standards Bd., GRI 207: Tax 2019 2 (2019), https://www.wlrk.com/docs/gri-207-tax-2019.pdf [https://perma.cc/4TE9-NNFU].

18. World Econ. F., Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation 19, 78 (2020), https://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf [https://perma.cc/9RSS-KH56]; *see also Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation*, World Econ. F., https://www.weforum.org/publications/measuring-stakeholder-capitalism-towards-common-metrics-and-consistent-reporting-of-sustainable-value-creation/ [https://perma.cc/J6HA-LLEA].

("FASB") signaled that it would follow suit, publishing new draft reporting requirements intended "to enhance the transparency and decision usefulness of income tax disclosures."[19] Accordingly, as the accounting giant PwC's Global Tax Policy Leader recently acknowledged, "[t]ax is a crucial part of the ESG conversation."[20]

This Article focuses on an emerging shift in business thinking regarding CSR and its potential impact on corporate tax planning. Though much of the focus of nascent conversations at the intersection of CSR and tax has been on *how much* corporations pay,[21] this Article argues that another important but often overlooked question relates to corporate discretion regarding *where* to pay tax. Discretion concerning where to pay tax is considerable, and much of it will likely survive efforts to reform the international tax system currently led by the OECD.[22] Because even low (and zero) tax jurisdictions have now implemented the OECD's 15% minimum tax, the *how much* question may begin to become less pressing (though it will still be present when companies face a choice between a minimum tax jurisdiction and a jurisdiction with a corporate income tax

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19. Fin. Acct. Standards Bd., *Income Taxes (Topic 740): Improvements to Income Tax Disclosures*, PwC (Dec. 14, 2023), https://viewpoint.pwc.com/dt/us/en/fasb_financial_accou/asus_fulltext/2023/asu202309/asu202309/fasbasu202309.html#pwc-topic.dita_0034e153-7cd1-4c7f-99c8-c8f6db77d144 [https://perma.cc/ER3R-3JFJ].

20. William Morris & Edwin Visser, *Tax is a Crucial Part of the ESG Conversation*, PwC, https://www.pwc.com/gx/en/services/tax/publications/tax-is-a-crucial-part-of-esg-reporting.html [https://perma.cc/4PN8-LTL5] (last visited July 28, 2023).

21. *See, e.g.*, Danielle A. Chaim & Gideon Parchomovsky, *The Missing "T" in ESG*, 77 Vand. L. Rev. 789, 827 (2024) (focusing on links between "corporate tax avoidance" and ESG).

22. *See* Kimberly A. Clausing, *Taxation in the Open Economy*, Oxford Rsch. Encyclopedia Econ. & Fin. (July 2023) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419598 [https://perma.cc/ZU3L-TCYV] (noting that "the mobility of the multinational corporate tax base makes it difficult to tax the companies that are most likely to be wielding market power and earning rents"); Kimberly A. Clausing, The International Tax Agreement of 2021: Why It's Needed, What it Does, and What Comes Next? 1, 7 (2023), https://www.piie.com/sites/default/files/2023-04/pb23-4.pdf [https://perma.cc/4YJL-4WHC] [hereinafter Clausing, The International Tax Agreement of 2021] (highlighting the problem of "mobile multinational income," observing that "the international agreement provides an incomplete solution to these longstanding policy problems," and asserting that "[t]he international tax agreement does not put an end to tax competition, but it does limit tax competition in important ways"); David Kamin, *The Ambition and Limits of the Global Minimum Tax*, TaxNotes (Oct. 17, 2022), https://www.taxnotes.com/featured-analysis/ambition-and-limits-global-minimum-tax/2022/10/14/7f7l0 [https://perma.cc/2Q3P-6J6K].

rate higher than 15%).[23] This Article asserts that CSR may offer significant insights to guide corporate discretion with respect to where to pay tax, and it explores how this potential might be mobilized.

The Article proceeds as follows. Part I illustrates that international tax and CSR are fields of scholarship that often talk past one another. It ascribes this divergence to a different underlying disposition of each field toward how to deal with the discretion of private actors. In addition, it argues that previous attempts to bring the two fields into a more sustained conversation have faltered because the core question utilized—*how much* tax companies should pay—merely aggravates this mismatch regarding how law should address discretion.

Part II examines how this divergence between the two fields is reflected in ongoing international legal projects that arise out of each. It shows how emerging treaty projects that seek to enshrine the international legal obligations and social responsibilities of business actors neglect an articulation of such obligations with respect to tax. It also illustrates how international tax measures seek only to erase corporate discretion through state measures, rather than attempting to order or influence corporate discretion towards socially desirable outcomes.

Part III suggests treating corporate discretion regarding international tax as a social fact rather than a normative preference. Doing so is not an endorsement of this discretion, but merely a recognition that it exists. Once recognized, CSR (a field built on and out of corporate discretion) might offer important guidance to companies with respect to the exercise of their discretion regarding where to pay tax. This Part also demonstrates how companies and those assessing their conduct might apply some important CSR priorities articulated in the draft legal agreements discussed in Part II to corporate tax discretion.

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23. Reuven S. Avi-Yonah, *Pillar 2 and the United States: What's Next*, TAXNOTES, (Jan. 29, 2024), https://www.taxnotes.com/featured-analysis/pillar-2-and-united-states-whats-next/2024/01/26/7j41s [https://perma.cc/N8RW-KJSF] (observing that "January 1 marked the official effective date of the 15 percent global corporate minimum tax imposed by pillar 2 as part of the G-20/OECD/inclusive framework base erosion and profit-shifting 2.0 project" and that "Pillar 2 went into effect in Australia, Canada, the EU, Japan, Norway, South Korea, and the United Kingdom, with more countries expected to adopt it soon, including low-tax countries like Barbados, Ireland, Luxembourg, the Netherlands, and Switzerland").

Part IV considers corporate tax as a valuable but limited resource over which states continue to compete. It analyzes another recent instance of corporate control over the global distribution of a scant resource—newly developed COVID vaccines. It utilizes this example to demonstrate reasons for caution concerning corporate tax discretion and to illustrate the limits of CSR when wealthy states seek to guarantee a different distributive outcome.[24]

I. CSR and Tax: Talking Past One Another

CSR has a tax problem, but tax also has a CSR problem. Neither fully acknowledges the other. This Part will demonstrate these concerns as they play out in the scholarship of each field and offer a rationale for this persistent gap between the two.

First, it is important to clarify a definitional matter. Throughout this Article, I use 'corporate social responsibility' or 'CSR' to capture the umbrella of terms and legal concepts, through which, for-profit business entities have been pressed to and have committed to do more than is strictly required under the prevailing law of the jurisdiction in which they are operating. As they have evolved, some of these concepts have hardened into binding law. Indeed, Erika George has observed that there is a continuum of legality with respect to these pro-social business pledges and obligations.[25] These concepts go by different names and each captures significant nuances: ESG (Environmental/Social/Governance), BHR (Business and Human Rights), corporate sustainability, stakeholder-ism, and the list continues.

I use CSR as a catch-all, while acknowledging that this may not be satisfactory to those steeped in each subfield. I justify this choice in three ways. First, CSR is a conceptual shorthand in the same way that 'corporation' is a stand-in term that groups together a slew of different kinds of 'for-profit business entities.' Using 'corporation' erases much of the nuance of the various kinds and categories of for-profit entities that

24. *See also* Jay Butler, *The Corporate Keepers of International Law*, 114 Am. J. Int'l L. 189, 216–17 (2020) (observing that "enabling corporations to make such choices may well lead to the prioritization of certain norms . . . over others," and that this concern "is one shared with the current state system, where powerful states can often dictate . . . .").

25. Erika George, Incorporating Rights: Strategies to Advance Corporate Accountability 326–28 (2021).

different legal systems have created, but it is a common terminological move among various scholars in the field.[26]

Additionally, the use of CSR is a reference to the invocation of the term in both Brazil's model Cooperation and Facilitation Investment Agreement, and the Investment Cooperation and Facilitation Treaty concluded in 2020 between Brazil and India.[27] Each text specifically requires investors to comply with "voluntary principles and standards for a responsible business conduct," to "[c]ontribute to the economic, social and environmental progress, aiming at achieving sustainable development," to "[r]espect international recognized human rights," and to "[r]efrain from seeking or accepting exemptions that are not established in the . . . tax system" among other commitments.[28] Though these treaties reference unlawful tax evasion rather than corporate tax discretion relating to lawful activities, they also utilize CSR as a shorthand to capture the panoply of environmental, human rights, and economic development commitments that will be explored later as components to inform corporate discretion regarding where to pay tax. Moreover, the treaties' use of CSR also illustrates the continuing relevance of CSR for articulating obligations in international parlance.

Further, companies do not use these different terms with sufficient precision to justify an exacting differentiation in this Article. It would seem odd to attach conceptual or taxonomic significance to the fact that 3M refers to its tax commitments with respect to corporate sustainability and global impact, whereas BNY and PwC describe similar commitments within the paradigm of ESG. As such, the Article follows the terminological capaciousness of the business entities on which it focuses.

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26. *See, e.g.*, Kishanthi Parella, *Corporate Foreign Policy*, 64 B.C. L. Rev. 1981, 1983–84 (2023); Julian Arato, *Corporations as Lawmakers*, 56 Harv. Int'l L.J. 229, 231 (2015).

27. Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and (Hereinafter Designated as the "Parties" or Individually as "Party") art. 14, 2015, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download [https://perma.cc/8AFN-XU6N] (model treaty); Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, art. 12, Jan. 25, 2020, (not yet entered into force), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download [https://perma.cc/4WRR-2LDY].

28. Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and (Hereinafter Designated as the "Parties" or Individually as "Party"), *supra* note 27, art. 14; Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, *supra* note 27, art. 12.

This Part provides an overview of the state of the scholarship at the intersection of tax and CSR. It makes three points regarding how the two fields largely talk past one another. To be clear, these observations are not intended as criticisms. Instead, these observations sketch in broad strokes the current nature of scholarly conversations at the intersection of tax and CSR before turning to consider the potential value of this Article's intervention.

First, scholars of international tax tend to focus on states and state-led regulation and often overlook corporations as actors, not just subjects of law. This near-exclusive focus on states and state-constituted international organizations, like the OECD, as the key regulatory actors is illustrated by a voluminous literature. Tsilly Dagan's magisterial book on international tax, for example, is a rigorous examination of the core legal and policy issues, but it almost entirely neglects any contribution that the internalization of social responsibility norms *by companies* with respect to tax might make to the regulatory interventions discussed.[29] In Dagan's framing, states and international organizations adopt rules competitively and collaboratively, but the choices of companies in the interstices of these rules merit little discussion beyond assuming that companies will exploit and abuse tax "loopholes."[30] This orientation toward international tax as a legal project wherein states and state-constituted organizations work together to close loopholes or gaps that will otherwise and inevitably be unscrupulously exploited by profit-hoarding corporations is mirrored in the work of other prominent tax scholars.[31]

29. Tsilly Dagan, International Tax Policy: Between Competition and Cooperation 129 (2018) ("For multilateral coordination to be truly effective in preventing tax competition, states would have to agree on the common basic building blocks of their tax systems . . . . This would enable them to close the loopholes that arise from the inconsistencies between different jurisdictions and facilitate tax avoidance. Moreover, to curb the race to the bottom, states must coordinate not only their tax rules but also their tax rates . . . .").

30. *Id.* at 128 (arguing that "the decentralized structure of the international tax regime is responsible for significant conflicts between jurisdictions. These conflicts, in turn, have led to the creation of loopholes. Loopholes are prominently abused by tax planners seeking to reduce their effective tax rates . . . . The loopholes not only create free-riding opportunities but also entail major planning costs (for taxpayers) and enforcement costs (for the government)").

31. *See, e.g.*, Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 Yale J. Int'l L. 199, 236 (2022) (framing companies as targets of anti-tax avoidance measures without an active role as law keepers and noting that her article "has shed light on how

Similarly, with respect to distributional *choices* regarding where tax is paid and disputes therein, Steven Dean, Ruth Mason, and Afton Titus have all produced insightful scholarship.[32] These scholars make thoughtful points regarding questions of race, diplomacy, and economic development that impact the distributional choices of international tax.[33] Yet each scholar is clear in articulating these matters as concerns solely for states to address and resolve.[34]

This Article posits that securing full compliance with existing tax laws and guiding choices regarding the distribution of global tax revenue are not just questions that should be addressed to and resolved by states. Instead, it asserts that there is value in thinking more closely about corporate choices and the ways that these choices may contribute to or alleviate ongoing concerns. However, for this to occur, the scholarship in each parallel field—tax and CSR—should be urged to take greater cognizance of the other.

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interactions among the OECD, EU, G20, and nation states have come to shape the world tax polity that has emerged over the last decade"); Diane Ring & Constantino Grasso, *Beyond Bribery: Exploring the Intimate Interconnections Between Corruption and Tax Crimes*, 85 L. & CONTEMP. PROBS. 1, 38, 40 (2022) (asserting that "[t]he misuse of corporate political and economic power, the actions of professional enablers, and revolving door practices all create a dangerous cocktail that may support and facilitate corrupt practices and tax abuses" and contending that "[t]he massive expansion of the 'gray areas' of tax abuse skillfully navigated by unscrupulous tax advisers allows powerful individuals and entities to exploit the multitude of legal gaps in the tax regime to eliminate their tax liability"); Michael J. Graetz & Rachael Doud, *Technological Innovation, International Competition, and the Challenges of International Income Taxation*, 113 COLUM. L. REV. 347, 351, 404 (2013) (describing tax planning strategies deployed by multinational enterprises ("MNEs") that "national governments have found extremely difficult to control" and contending that "the ultimate question then is, given . . . the ability—and success—of MNEs to shift their IP income to low- or zero-tax jurisdictions, what are the most sensible policy responses?").

32. *See, e.g.*, Steven A. Dean & Attiya Waris, *Ten Truths about Tax Havens: Inclusion and the "Liberia" Problem*, 70 EMORY L.J. 1657, 1682 (2021) ("Whether racial, gender, religious, or ethnic, the truth of the matter is that failure to make a consistent effort to be inclusive and to level all elements of the playing field will continue to hamper the ability of states to achieve an inclusive, fair, and just outcome and a future that delivers an international system that is fiscally legitimate."); Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 387 (2020) ("Having accepted full taxation as a norm, countries now face a new challenge: to avert a kind of free-for-all in which many states try to fill the same tax void."); Afton Titus, *Global Minimum Corporate Tax: A Death Knell for African Country Tax Policies?*, 50 INTERTAX 414, 422 (2022) (asserting that "[a]ll developed and developing countries should cooperate to eliminate virtual tax competition that involves the shifting of paper profits").

33. *See* sources cited *supra* note 32.

34. *See* sources cited *supra* note 32.

Treating corporations as actors also means recognizing and seeking to discipline the discretion that business entities retain in international tax, rather than just trying endlessly to have states eliminate such discretion through closing loopholes. In this way, this Article incorporates perspectives long-present in international law with respect to alternative pathways of legal persuasion and embraces a broad understanding of the participants in the international legal system beyond states.[35] International law generally has long had to grapple with its supposed lack of 'effectiveness'; or, its inability simply to give a command and expect its audience to obey.[36] Instead, more complex structures of legal obligation have been explored and articulated so as to work toward more meaningful compliance and overcome the possibility that states might simply choose exit from the international legal system via noncompliance or active resistance. Thinking about corporations in this broader way through including CSR as a means to guide discretion, as this Article proposes, thereby also offers the potential to bring international tax more in line with emerging perspectives in other areas of international law.

The second observation put forward by this Part is that scholars of CSR rarely discuss tax. As such, a group of scholars who clearly recognize business discretion and are regularly engaged in thinking about how best to guide it, usually omit tax from the range of social and legal priorities as to which the impact of business conduct is examined and assessed. This omission presents a challenge both for bringing the two fields into conversation with one another and for aligning their differing approaches.

Thus, just as tax largely ignores CSR, CSR largely ignores tax. Elizabeth Pollman, Dorothy Lund, Aneil Kovvali, Colleen Honigsberg, and Dan Esty (just to name a few) have each offered important work concerning the history and contemporary shape of corporate sustainability.

35. *See* Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 845 (2023) (asserting that "corporations continue to comply with international law even when a government actor does not make them do it"); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 39 n.1 (2013) (observing that though they focus on internalizing norms directed to states, their model "would apply to a broad range of organizational entities, including subnational governments, inter-governmental organizations ("IGOs"), NGOs, multinational corporations, and armed opposition groups").

36. Lori Fisler Damrosch, *Enforcing International Law Through Non-forcible Measures*, 269 RECUEIL DES COURS 9, 19 (1997) (observing that "[a] fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement").

Yet, each scholar has almost nothing to say about tax in the context of corporate social responsibility.[37]

In a recent paper published after this Article was submitted for publication, Danielle Chaim and Gideon Parchomovsky similarly posit that the current CSR discourse overlooks tax as an important topic of concern.[38] Yet, they seem to lay much of the blame for this omission at the doorstep of ratings agencies that assess company compliance with CSR commitments, without considering how scholarship in this area similarly has largely bypassed such conversations.[39] This Article considers the influence of ratings agencies as a potential means of guiding corporate conduct with respect to tax, but it is important to note that such agencies are not the sole agents involved in setting the topics and terms of the CSR discourse.

The third proposition advanced in this Section is that while there are rare instances of convergence between the two fields of scholarship, the focus of such analyses usually falls on *whether* tax should form a part of the evaluation of a company's conduct according to CSR. And, if so, the analysis usually focuses on an extension of that question: *how much* tax should be paid to satisfy CSR. But these analyses at the potential intersection of tax and CSR often miss the question of *where* tax is paid, which is a matter of import both to international tax and to the exercise of corporate discretion in this regard.[40]

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37. *See, e.g.*, Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 Colum. L. Rev. 2563, 2618–20 (2021); Aneil Kovvali, *Stakeholderism Silo Busting*, 90 U. Chi. L. Rev. 203 (2023); Paul Brest & Colleen Honigsberg, *Measuring Corporate Virtue and Vice: Making ESG Metrics Trustworthy*, *in* Frontiers in Social Innovation: The Essential Handbook for Creating, Deploying, and Sustaining Creative Solutions to Systemic Problems (Neil Malhotra ed., 2022); Dan Esty & Todd Cort, *Toward Enhanced Sustainability Disclosure: Making ESG Reporting Serve Investor Needs*, 16 Va. L. & Bus. Rev. 423, 443 (2022) (observing that "investors' calls for ESG disclosure grow louder," but not discussing this additional reporting dimension in the context of corporate tax planning); *cf.* Dorothy S. Lund, *Corporate Finance for Social Good*, 121 Colum. L. Rev. 1617, 1650 (2021) (briefly discussing instances when the government offers tax breaks for prosocial behavior like the charitable deduction).

38. Chaim & Parchomovsky, *supra* note 21, at 800 (observing generally and without citation that, "[d]espite the apparent congruence between the social responsibility perspective of corporate tax avoidance and ESG values, the current ESG discourse fails to recognize the significance of corporate tax payments as a crucial component within the ESG framework").

39. *Id.*

40. The *how much* and the *where* questions cannot be entirely separated because jurisdictions may levy different tax rates. To the extent that scholars focus on where to

Reuven Avi-Yonah, for example, offers three paradigms according to which CSR may be understood to include questions of tax. Yet his proposed means for integrating the two fields is that CSR should operate as a total bar to preclude sophisticated tax planning schemes to reduce the amount that companies owe. And he urges that executives faced with such choices should "just say no."[41] Similarly, Rachel Brewster sounds the alarm that "large corporate enterprises are increasingly using foreign subsidiaries to engage in zealous tax avoidance" and asserts that "[c]urrent enterprise law effectively advantages less responsible firms by allowing them to deflect tax . . . ."[42] Others who have taken up the call to bring the two fields together have also sought to do so in terms of *how much* tax a company ought to be expected to pay to discharge its social responsibility.[43]

Yet the question of *how much* pinpoints a mismatched orientation between the two fields. The easy reply of tax planners and tax scholars to CSR's inquiry about the amount of tax companies should pay is that companies should pay what is legally due.[44] This is because of tax law's

address corporate use of low tax jurisdictions, however, their actual focus is usually on how much the company is paying in tax by choosing to subject itself to the tax law of said place.

41. Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & Bus. 1, 29 (2014).

42. Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 Wis. L. Rev. 1367, 1376, 1406 (2022); *see also* Daniel Shaviro, *Interrogating the Relationship between "Legally Defensible" Tax Planning and Social Justice*, *in* Tax, Inequality, and Human Rights 347, 347, 349 (Philip G. Alston & Nikki R. Reisch eds., 2019) (observing that "the tax-reducing strategies of super-rich individuals and highly profitable corporations commonly qualify as what I will call 'legally defensible,'" and seeking to identify "some of the main fault lines raised by social justice challenges to legally defensible high-end tax planning" through "an unusual format: that of a dialogue between two wholly fictitious individuals").

43. *See* Doron Narotzki & Tamir Shanan, *Cross-Border Corporate Social Responsibility and Taxation: A New Conceptual Framework in an Era of Economic Globalization*, 17 Ohio State Bus. L.J. 155, 162–65 (2023); Hans Gribnau, *Why Social Responsible Corporations Should Take Tax Seriously*, *in* Fair Taxation and Corporate Social Responsibility 122 (Karina K. E. Elgaard et al. eds., 2019); Shane Darcy, *'The Elephant in the Room': Corporate Tax Avoidance & Business and Human Rights*, 2 Bus. & Hum. Rts. J. 1, 24 (2017); Jenkins & Newell, *supra* note 8, at 392 (asserting that "many TNCs [transnational corporations] see no contradiction in espousing CSR while at the same time seeking to minimise their tax liabilities, often through aggressive tax avoidance").

44. Matti Kohonen et al., *Creating a Human Rights Framework for Mapping and Addressing Corporate Tax Abuses*, *in* Tax, Inequality, and Human Rights 385, 388 (Philip G. Alston & Nikki R. Reisch eds., 2019) ("When tax is seen purely as an area

focus on what is mandatory, as instructed by the state.[45] But the whole point of CSR is that doing the bare minimum of what the law requires is not enough.[46]

Of course, *how much* and *where* are questions that are linked. Tax arbitrage is an ongoing policy concern exactly because different jurisdictions offer different tax rates. The OECD's Global Minimum Tax may soon establish a floor for this payment obligation so as to reduce incentives for tax competition. However, the deal also contains a substance-based income exclusion so that if a company invests in economic activity in a particular jurisdiction, that jurisdiction may offset the additional tax paid by offering a subsidy.[47]

As such, the argument is not that we should focus on *where* instead of *how much*; nor is it suggested that the two questions can be separated neatly one from the other. Instead, the observation is that the *how much* question will immediately present a stumbling block for an ongoing dialogue between the two fields because each field approaches discretion very differently. Moreover, the how much question cannot be overcome simply by the easy tax reply—paying that which is legally due—because the next question is: *due* according to *whose* law? That choice of law in structuring tax transactions implicates the *where* question, and it may therefore constitute an alternate starting point from which to initiate the intersection conversation between CSR and tax.

Yet, as the next Section will highlight, the ongoing estrangement between the two fields sketched heretofore is also reflected in the international legal landscape at present. There are a number of important

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of legal compliance, human rights impact on business tax practices is not considered an issue.").

45. *See, e.g.*, Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) ("[A] transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Any one may arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.").

46. Darcy, *supra* note 43, at 20 ("The claim that corporate social responsibility involves going 'beyond compliance' gives rise to a tension in the context of corporate tax avoidance."); Jenkins & Newell, *supra* note 8, at 388 ("The argument often put by those who defend tax avoidance (as opposed to illegal tax evasion) is that no company (or individual) is under any obligation to pay more than the minimum tax which they are legally required to pay and that it is legitimate business practice to arrange your affairs in such a way as to minimize tax payments within the law.").

47. Clausing, The International Tax Agreement of 2021, *supra* note 22, at 11.

international legal projects underway, either in the drafting stage or recently concluded and opened for adoption and ratification. Any one of these could have begun to bridge the gap between tax and CSR, but each has largely missed this opportunity.

II. Emerging Legal Landscape

This Part illustrates how views examined in Part I are mirrored in ongoing projects to reshape international law. The legal projects scrutinized in this Part have been lauded for their potential significance by proponents, but each missed an opportunity to connect the dots between tax and CSR. I refer to them as 'projects' because each represents a large-scale, collaborative effort to formulate and draft an international legal text and each is at a different stage of completion and implementation through legislation or treaty. These kinds of endeavors are often the culmination of years of activism and negotiation, and scholars need not wait to comment only on the final draft that is opened for ratification.[48] This Part demonstrates how each project has come close to addressing intersections of tax and corporate sustainability, but eventually turned this chance aside.

The projects to be discussed represent themes in international law thinking generally that have been moving in parallel without a full reckoning as to the ways in which they intersect. This Article proposes that one intersection point lies between tax and CSR. But to be clear, that need not be the only intersection point of these various themes. These projects reflect several themes.

There is first the notion that tax on a purely domestic or bilateral basis provides an insufficient framework for ensuring that companies pay their fair share and that states are not deprived of necessary resources. The innovation of international tax generally in recent years has been first to recognize the areas of mismatch between domestic tax law systems, wherein companies can use these mismatched definitions of essential terms like "source" and "residency" to lower their tax burden, sometimes even lowering that tax on income to zero.[49] As such, the various measures

48. *See, e.g.*, Melissa J. Durkee, *International Lobbying Law*, 127 Yale L.J. 1742, 1750–51 (2018) (observing that "[t]he current international legal context is further muddied by the instability of settled law and institutions" and that "uncertainty and change also present opportunities to reconsider key features of the current order.").

49. Mason, *The Transformation of International Tax*, *supra* note 32, at 354–57.

to be highlighted seek to build not only on the means of interstate cooperation to take a holistic and global view of how much tax companies pay on a world-wide basis, but they also seek to move away from the principle in international tax law first formulated in the 1920s that the primary concern of international tax is to avoid double taxation (so that companies pay tax on income in only one jurisdiction, only once).[50]

Instead, because high-tax countries have come to recognize that this non-double taxation principle has allowed for inter-state competition that allows companies to exploit these differing tax rates to minimize their tax liability, states have come together to find agreement on a tax floor or minimum tax that companies must pay in order to lessen the impetus toward this race to the bottom in terms of jurisdictions' tax rates.[51]

This interstate bargain is not without significant controversy. Developing countries often offer lower tax rates as an incentive to attract foreign investment.[52] And offshore financial centers (jurisdictions categorized as low-tax and sometimes referred to pejoratively as 'tax-havens') argue that their tax systems operate differently by taxing consumption, rather than income.[53] These financial centers also assert that international law ought not to be in the business of interfering with a government's decision as to how it wishes to tax its residents.[54] Tax and tax decision-making have long been thought to represent the very pinnacle of sovereignty (or decisions over which a government should be able to exercise its own

50. Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 Duke L.J. 1021, 1023 (1997) ("Despite massive changes in the world economy in the last seventy years, the international tax regime formulated in the 1920s has survived remarkably intact.").

51. OECD, Pillar Two, *supra* note 10, at 64; *see also* Reuven S. Avi-Yonah et al., *A New Framework for Digital Taxation*, 63 Harv. Int'l L.J. 279, 340 (2022) (explaining that "Pillar Two implements the single tax principle, meaning that corporate profits should be subject to a minimum tax and that if the country with the primary right to tax such income (source or residence) does not impose tax at the minimum level, the other country involved should tax it").

52. Titus, *supra* note 32, at 416.

53. Dean & Waris, *supra* note 32, at 1665.

54. Martin W. Sybblis, *Equality Offshore*, 63 B.C. L. Rev. 2667, 2681–82 (2022) (observing that "[i]nternational business, by way of the offshore sector, is therefore a viable route for bringing revenue and technology to their shores" and that "[c]onsequently, any effort to penalize these choices arguably goes against the international norms of respecting sovereignty and the right to self-determination"); *see* Karen E. Bravo, *Challenges to Caribbean Economic Sovereignty in a Globalizing World*, 20 Mich. St. Int'l L. Rev. 33, 38–39 (2011).

independent decision-making without outside interference).[55] To amend this has proven objectionable to some states. And the way that these international tax projects as led by the OECD have been handled and concluded has led to some states seeking to ensure an alternative bargain is struck to pursue a different process by drafting a global tax convention under the auspices of the United Nations.[56]

These debates are ongoing. However, the salient theme is that corporations are characterized as the problem insofar as they have been able to exploit the bilateral tax treaty framework whose orienting principle has previously been built on the basis of avoiding double taxation. And states and state-constituted international organizations are, in turn, characterized as the sole sources of resolution.

Additionally, it is appropriate to recognize that while states remain the primary focus in terms of seeking to address problems with the international tax system, the picture is different in the sphere of human rights. There, much contemporary activism, both from NGOs and from legal policymakers, concentrates on making corporations accountable for their actions that violate human rights law and utilizing corporate influence to compel other actors to comply with human rights norms.[57] There is also what may be framed as a tension or divide, with some lobbying for increased external oversight and sanctions against companies to punish wrongdoing and others seeking to ensure pathways through which companies might be encouraged to internalize norms of international law.[58]

A further, concurrent development with respect to centering companies as legal actors in international law generally has been to make the CSR commitments to which companies have begun to subscribe into

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55. U.N. Secretary-General, *Promotion of Inclusive and Effective International Tax Cooperation at the United Nations: Rep. of the Secretary-General*, ¶ 1, U.N. Doc. A/78/235 (July 26, 2023) ("A country's domestic tax system reflects its values and national priorities and is a fundamental aspect of its exercise of national sovereignty.").

56. G.A. Res. 77/244, ¶ 2 (Dec. 30, 2022) (deciding to "begin intergovernmental discussions in New York at United Nations Headquarters on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process . . . .").

57. Charity Ryerson et al., *Seeking Justice: The State of Transnational Corporate Accountability*, 132 YALE L.J. F. 787, 812 (Dec. 22, 2022).

58. *See* GEORGE, *supra* note 25, at 63.

more formal law-like rules.[59] The EU Corporate Sustainability Directive discussed below provides such an example. But there are other measures that seek to recognize CSR and enshrine what had previously been a solely voluntary area into something more legally binding.[60]

As such, with the increasingly obligatory character of CSR commitments and the internationalization of tax law, the two fields are moving closer to one another. This Article seeks to show how we might work with these developments in each field in a manner that may be productive and fruitful for both. But first, we must examine the lay of the current and emerging legal landscape.

This Section therefore begins by examining legal developments in CSR to illustrate that they have not so far adequately addressed tax. It then shows how emerging international tax agreements have neglected to take the increasing influence of CSR on business behavior into account in their rulemaking.

A. EU Corporate Sustainability

The EU Corporate Sustainability Reporting Directive entered into force on January 5, 2023,[61] and has since been widely heralded as a "game-changer."[62] The European Union has long been recognized as a leading

59. *Id.* at 259 (arguing that "the discursive frame asserted by corporate responsibility rhetoric incorporating human rights issues increasingly treats compliance with norms that are 'voluntary' as though these norms were obligatory").

60. *See* Ryerson et al. *supra* note 57, at 794–800; Shruti Rana & Afra Afsharipour, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. Davis Bus. L.J. 175, 190, 192 (2014).

61. *Corporate Sustainability Reporting*, Eur. Comm'n, https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en [https://perma.cc/VP9W-2RKE]; Council Directive 2022/2464, 2022 O.J. (L 322) 15.

62. *See, e.g.*, Stefan Grabs & Sonia Stuchtey, *Comment: Why Europe's New Reporting Standards Could Be a Game-changer for Nature*, Reuters, May 18, 2023, https://www.reuters.com/sustainability/sustainable-finance-reporting/comment-why-europes-new-reporting-standards-could-be-game-changer-nature-2023-05-18/ [https://perma.cc/UBC2-MV5U]; Andrew Hobbs, *How the EU's New Sustainability Directive is Becoming a Game Changer*, EY (Aug. 1, 2022), https://www.ey.com/en_gl/assurance/how-the-eu-s-new-sustainability-directive-is-becoming-a-game-changer [https://perma.cc/XJ48-MMEB]; Gijsbert Duijzer et al., *CSRD: Booster for Sustainable Real Estate Industry*, Deloitte (Mar. 29, 2022), https://www.deloitte.com/ce/en/industries/real-estate/perspectives/csrd-booster-for-a-sustainable-real-estate-industry.html [https://perma.cc/PQ5K-QP64] (describing the Sustainability Directive as "a game changer for Real Estate").

standard setter because of the size and lucrative nature of its market.[63] And conditioning access to the European Union on compliance with its norms is, therefore, a means of exporting EU standards globally.[64]

The Sustainability Directive is particularly important in this respect because it applies to a broad range of companies that do business in the European Union (regardless of their nationality), and it significantly enlarges what companies are required to disclose in their public reports.[65] Moreover, compliance with the requirements of the Directive will be enforced by EU Member States through heavy, "dissuasive" penalties for non-compliance.[66]

The Directive applies to companies listed in EU markets that are not 'micro-undertakings.' Entities within the scope of the Directive are defined as small, medium, and large companies that exceed certain narrowly drawn parameters relating to balance sheet, net turnover, and number of employees.[67] In addition, the Directive also applies to companies not listed in the European Union, including so-called "[t]hird-country undertakings which have significant activity on the territory of the Union."[68] The Directive gives as its rationale for the application of sustainability reporting requirements to non-EU companies its concern

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63. *See* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD xiii–xiv (2020).

64. *See, e.g.*, BLACKROCK, DRAFT EUROPEAN SUSTAINABILITY REPORTING STANDARDS: RESPONSE TO EFRAG CONSULTATION 2–3 (2022), https://www.blackrock.com/corporate/literature/publication/efrag-consultation-on-european-sustainability-reporting-standards-080822.pdf [https://perma.cc/CXU6-E6JQ] (noting that "[t]he extraterritorial scope of the Corporate Sustainability Reporting Directive (CSRD) is likely to impact a considerable number of international firms who will be required to report against the EFRAG standards in addition to their respective national or regional reporting frameworks").

65. *See generally* Thibault Meynier et al., *EU Finalizes ESG Reporting Rules with International Impacts*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 30, 2023), https://corpgov.law.harvard.edu/2023/01/30/eu-finalizes-esg-reporting-rules-with-international-impacts/ [https://perma.cc/2Q3E-PBN8].

66. Council Directive 2022/2464, *supra* note 61, ¶ 20 ("Member States shall provide for effective, proportionate and dissuasive sanctions."); Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive 2022/71, art. 20, (Feb. 23, 2022) ("Member States shall lay down the rules on sanctions applicable to infringements of national provisions adopted pursuant to this Directive . . . . The sanctions provided for shall be effective, proportionate and dissuasive.").

67. *See* Council Directive 2013/34, art. 3(1), 2013 O.J. (L 182) 19, 28.

68. Council Directive 2022/2464, *supra* note 61, at pmbl. ¶ 20.

for "ensur[ing] that third-country undertakings are accountable for their impacts on people and the environment" and its desire to create "a level playing field for companies operating in the internal market."[69] Consequently, the Directive provides that these third-country undertakings "which generate a net turnover of more than €150 million in the European Union and which have a subsidiary undertaking or a branch on the territory of the European Union should be subject to EU sustainability reporting requirements."[70]

An estimated 49,000 companies will now be subject to the Directive's reporting requirements.[71] The Sustainability Directive thus applies both to enterprises registered in the European Union and to many of those based outside it that do substantial business in the European Union. Therefore, its reach is broad and the capacity of the Directive to effect real change is significant.

The Sustainability Directive also expands public reporting requirements for companies covered under its scope terms by redefining what is considered material to include as aspects of corporate sustainability.[72] It requires that companies within its scope "shall include in the management report information necessary to understand the undertaking's impacts on sustainability matters," and that these enterprises also disclose "information necessary to understand how sustainability matters affect the undertaking's development, performance and position."[73] The Directive defines "sustainability matters" broadly to mean "environmental, social and human rights, and governance factors."[74]

Accordingly, the Sustainability Directive has both expansive scope and great potential impact. This makes the erasure of tax from the Directive's standards all the more troubling for those hoping to include tax within a robust conversation around CSR requirements.

The European Commission ("the Commission") tasked the European Financial Reporting Advisory Group ("EFRAG"), a legal non-profit

69. *Id.*

70. *Id.*

71. Greg Norman et al., *The EU Corporate Sustainability Reporting Directive: Who Does It Apply to and What Should EU and Non-EU Companies Consider?*, SKADDEN (Jan. 9, 2023), https://www.skadden.com/insights/publications/2023/01/qa-the-eu-corporate-sustainability-reporting-directive [https://perma.cc/SVQ5-9UBW].

72. *See* Council Directive 2022/2464, *supra* note 61, at arts. 19(a)(1)–(4), 29(c).

73. *Id.* art. 19(a)(1).

74. *Id.* art. 2(b)(17).

group based in Belgium, with the drafting of sustainability standards that would accompany and define the scope of the Directive's reporting requirements.[75] EFRAG conducted an extensive drafting process and convened various panels of experts. EFRAG submitted its final draft standards to the Commission on November 23, 2022.[76] The draft standards will form the basis of the Sustainability Directive's requirements, and the Commission just adopted its own version of these standards on July 31, 2023.[77]

At the outset of the process of drafting the sustainability standards, it seemed that tax, or more specifically strategies of tax planning and tax avoidance, would be included in the mandatory sustainability disclosures. In EFRAG's report to the Commission in February 2021, entitled *Proposals for a Relevant and Dynamic EU Sustainability Reporting Standard-Setting*, "tax responsibility & avoidance" was mentioned right alongside anti-bribery and corruption as "aspects closely related to impacts on people and the environment" that were therefore "relevant" to the definition of sustainability.[78]

As late as May 2022, executives from the international accounting and tax planning firm, PwC, were forecasting to other tax professionals that the Sustainability Directive's reporting requirements would "likely also include tax reporting considerations and a question on the readiness of [corporate] tax control framework."[79] Yet such measures were not

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75. Euro. Comm'n Exec. Vice-President, Letter dated June 25, 2020, from Valdis Dombrovskis, Exec. Vice-President, Eur. Comm'n, to Jean-Paul Gauzès, Chairman, EFRAG Corp. Rep. Lab, https://www.efrag.org/Assets/Download?assetUrl=/sites/webpublishing/SiteAssets/Letter%2520EVP%2520annexNFRD%2520%2520technical%2520mandate%25202020.pdf [https://perma.cc/MFR9-8ME7]; Eur. Fin. Reporting Advisory Grp. [EFRAG], *Draft European Sustainability Reporting Standards: Due Process Note* (Nov. 2022), https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2F02%2520Due%2520process%2520note%2520-%2520First%2520set%2520of%2520ESRS%2520-%252022%2520November%25202022.pdf [https://perma.cc/4TEV-UGA2].

76. Press Release, EFRAG, EFRAG delivers the first set of draft ESRS to the European Commission (Nov. 23, 2022), https://www.efrag.org/Assets/Download?assetUrl=/sites/webpublishing/SiteAssets/EFRAG+Press+release+First+Set+of+draft+ESRS.pdf&AspxAutoDetectCookieSupport=1 [https://perma.cc/78KB-2AYQ].

77. Commission Delegated Regulation 2023/5303 of July 31, 2023 (EC).

78. EFRAG, *Proposals for a Relevant and Dynamic EU Sustainability Reporting Standard-Setting* ¶ 386, (Feb. 2021), https://finance.ec.europa.eu/system/files/2021-03/210308-report-efrag-sustainability-reporting-standard-setting_en.pdf [https://perma.cc/VV7B-5PTR].

79. Evi Geerts & Melodie Geurts, *CSRD—A Game Changer in Sustainability Reporting with a Link to Tax*, Int'l Tax Rev., May 10, 2022, https://www.internationaltaxreview.

explicitly included in the final version of the reporting requirements, and an enduring question is why.

Indeed, by September 2022, the EFRAG Secretariat, summarizing the comments received to the initial draft of the sustainability standards and outlining the Secretariat's reactions, noted simply that the promulgation of standards on "tax compliance" was "not feasible at this stage"[80] and that "[t]ax is outside the scope of CSRD [Corporate Sustainability Reporting Directive]."[81] Anti-bribery and corruption survived in the draft of the sustainability standards that EFRAG submitted, but tax avoidance is now nowhere to be found. Indeed, the draft standards cover "human rights, anti-bribery, and corruption," but "taxation is not explicitly mentioned so far in the EFRAG work."[82]

In the final version of the reporting standards adopted by the Commission, there is a fleeting mention of tax. The Commission's standards establish a disclosure requirement with respect to business "impacts on affected communities" which "originate in the undertaking's strategy or business model."[83] The Commission notes that such an impact may include "aggressive strategies to minimize taxation, particularly with respect to operations in developing countries."[84] Thus, it would seem that tax may be included in corporate sustainability to the extent that corporate tax strategies undermine economic development. This may offer a glimmer of possibility for bringing tax and CSR together, and this point will be revisited in Part III.

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com/article/2a6abcbtm7tszx7bxiz9c/csrd-a-game-changer-in-sustainability-reporting-with-a-link-to-tax [https://perma.cc/VG69-3KDH].

80. EFRAG, *Secretariat Analysis of the Overall Comments on the Governance Standards* 5 (Agenda Paper 05-02 SRT/SRB Meeting, Sept. 23, 2022) https://efrag-website.azurewebsites.net/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FMeeting%20Documents%2F2207190817469306%2F05-02%20Governance%20Assessment%20of%20overall%20comments%20-%20Table%201%20EFRAG%20SR%20TEG%2022-09-23.pdf&AspxAutoDetectCookieSupport=1 [https://perma.cc/UU8A-TP7G].

81. *Id.* at 4.

82. EU Platform on Sustainable Fin., *Final Report on Minimum Safeguards*, at 15 (Oct. 2022), https://finance.ec.europa.eu/system/files/2022-10/221011-sustainable-finance-platform-finance-report-minimum-safeguards_en.pdf [https://perma.cc/QD2V-YLFR].

83. Annex to the Commission Delegated Regulation C/2023/5303 of July 31, 2023, 217 (EC), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM%3AC%282023%295303 [https://perma.cc/E3GV-K35W].

84. *Id.*

On July 5, 2024, the EU's Corporate Sustainability Due Diligence Directive ("CSDDD") was formally adopted.[85] Like the CSRD, it brings into force various sustainability obligations both for EU-based companies and those incorporated outside the European Union but that meet certain thresholds of net turnover of business conducted in the European Union. Yet, like the CSRD, it does not contain explicit mention of tax as a sustainability obligation for businesses subject to its provisions. The CSDDD does mention human rights, the environment, and sustainable development as areas as to which business should avoid making adverse impacts.[86] This Article outlines how these factors may bridge connections between CSR and tax that documents like the CSRD and CSDDD have largely chosen to sidestep.

B. Business and Human Rights Treaty

This Section sketches the trajectory of international law in this area. It highlights the absence of tax from the project to enshrine within international law binding obligations for business entities with respect to human rights, despite a burgeoning literature that has sought to characterize tax and tax avoidance as a leading human rights issue.

To a growing number of commentators, tax is fundamentally a human rights issue.[87] Tax revenue allows states to fulfill their guarantees of socio-economic rights by providing various social services to citizens. Countries that do not collect an adequate proportion of tax revenue for their governments to function effectively, often descend into instability.[88]

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85. Council Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760 [https://perma.cc/9JAA-Y5ZZ].

86. *Id.* at pmbl. ¶¶ 5, 8, 10.

87. Nikki Reisch, *Taxation and Human Rights: Mapping The Landscape*, *in* TAX, INEQUALITY, AND HUMAN RIGHTS 34 (Philip G. Alston & Nikki R. Reisch eds., 2019); Magdalena Sepúlveda Carmona (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 6, U.N. Doc. A/HRC/26/28 (May 22, 2014); ATTIYA WARIS, TAX AND DEVELOPMENT: SOLVING KENYA'S FISCAL CRISIS THROUGH HUMAN RIGHTS 123, 147 (2013) (asserting that "human rights scholars have also largely ignored the issue of fiscal requirements to the realisation of human rights" and arguing that "[t]o realise human rights, the fiscal requirements for each and every single right and its enforceability as a result will require that all rights be addressed together").

88. Dina Pomeranz & José Vila-Belda, *Taking State-Capacity Research to the Field: Insights from Collaborations with Tax Authorities*, 11 ANN. REV. ECON. 755, 756 (2019);

It is in such settings of public turbulence, or what John Ruggie, author of the U.N. Guiding Principles on Business and Human Rights, labeled "law-free zones," that the worst human rights abuses occur.[89]

As an indication of this increasing recognition of linkages between tax and human rights, various NGOs have begun to highlight corporate tax avoidance as a serious source of concern that contributes negatively to human rights outcomes.[90] Further, the U.N. Committee on the Rights of the Child even criticized Ireland recently for facilitating aggressive corporate tax minimization strategies and urged the country to consider the role of its tax laws in eroding human rights elsewhere.[91] In its response to Ireland's 2023 Periodic Review submissions, the Committee urged the country to "[e]nsure that tax policies do not contribute to tax abuse by companies registered in the State party but operating in other countries, leading to a negative impact on the availability of resources for the realization of children's rights in those countries."[92] But this is not just a problem for states.

International law has increasingly sought to have its human rights obligations apply also to the activities of corporations, not just states. Corporations have responded by including pledges to abide by human rights in their CSR codes.[93] Despite much progress in this area, however, corporate choices around tax have largely been left out of current legal projects to formalize the human rights obligations of business entities.

Timothy Besley et al., *Weak States and Steady States: The Dynamics of Fiscal Capacity*, 5 AM. ECON. J.: MACROECON. 205, 226–27 (2013); Timothy Besley & Torsten Persson, *Taxation and Development*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 51–110 (Alan J. Auerbach et al. eds., 2013) (noting that "[p]olitical instability is harder to measure in a convincing way, but there seems to be some evidence that more stability is correlated with higher fiscal capacity").

89. JOHN G. RUGGIE, JUST BUSINESS 29 (2013); John Ruggie (Special Representative of the U.N. Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, U.N. Doc. A/HRC/17/32 (May 27, 2011) (observing that "[u]nsurprisingly, the most egregious business-related human rights abuses also take place in such environments [conflict situations], where the human regime cannot be expected to function as intended").

90. *See* ACTIONAID, *supra* note 15, at 8–9.

91. Comm. on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland*, ¶ 13(f), U.N. Doc. CRC/C/IRL/CO/5-6 (Feb. 28, 2023).

92. *Id.*

93. Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT'L L. & POL. 433, 454–73 (2021).

At present, the U.N. Global Compact ("the Compact") proudly claims to have over 21,000 businesses based in 162 countries as participants.[94] These businesses each pledge to honor the Compact's 10 principles on human rights, labor, the environment, and anti-corruption.[95] But, the Compact makes no mention of tax.[96]

Similarly, the U.N. Guiding Principles on Business and Human Rights ("the U.N. Guiding Principles") declare that "[t]he responsibility to respect human rights requires that enterprises . . . [a]void causing or contributing to adverse human rights impacts through their own activities . . . ."[97] Yet, the U.N. Guiding Principles do not urge that business be under any explicit or enhanced duty to pay tax. This is particularly confounding because the U.N. Guiding Principles note that business should respect and not undermine the "core internationally recognized human rights," among which is the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[98] But one could rightly question how a state will be able to guarantee the rights of its citizens to health, housing, social security, and education (as the ICESCR requires) if businesses do all they can to avoid paying taxes that might otherwise ensure the attainment of these rights.[99]

As the culmination of international efforts to formalize corporate obligations with respect to human rights, the U.N. Human Rights Council adopted a resolution in 2014 to begin work on a legally binding treaty.[100] Since then, the Intergovernmental Working Group that the Human Rights Council tasked with authoring the treaty has released several drafts of the future treaty, but none of these articulates any business obligation regarding tax.[101]

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94. *The Ten Principles of the UN Global Compact*, UN, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/6HBS-87GN] (last visited Jan. 27, 2024).

95. *Id.*

96. *See id.*

97. U.N. Off. of the High Comm'r, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, at 14, U.N. Doc. [ST/]HR/PUB/11/4 (2011).

98. *Id.*

99. G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights, arts. 9, 11–13 (Dec. 16, 1996).

100. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

101. *See* Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other

Part III will return to how human rights discourse with respect to business obligations may provide a basis for how tax and CSR might coalesce. For now, it suffices to note that thus far, the most prominent, ongoing international legal project has declined to formalize these potential linkages. As such, it represents yet another missed opportunity to bring tax and CSR together in the manner that this Article suggests.

C. Development Convention

In 1986, the U.N. General Assembly declared that "[t]he right to development is an inalienable human right."[102] The most recent effort to give legal form to the right to development has come with the new draft of the Convention on the Right to Development.[103] The draft of the Convention frames the duty to secure the right to development as the "primary responsibility" of states, but it also acknowledges that "every organ of society at the national or international level has a duty to respect the human rights of all, including the right to development . . . ."[104]

Business Enterprises (July 16, 2018) (zero draft), https://media.business-humanrights.org/media/documents/files/documents/DraftLBI.pdf [https://perma.cc/W834-YTVY]; Human Rights Council, Legal Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (July 16, 2019) (revised draft), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [https://perma.cc/Z6JE-MU7D]; Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 6, 2020) (second revised draft), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf [https://perma.cc/2YUA-2KQU]; Human Rights Council, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprise (Aug. 17, 2021) (third revised draft), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf [https://perma.cc/F9NN-MYEN]; Human Rights Council, Legally Binding Instrument (Clean Version) to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (July 2023) (updated draft), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [https://perma.cc/8FPN-AZ2W] [hereinafter Business and Human Rights Treaty 2023 Draft].

102. G.A. Res. 41/128 art. 1 (Dec. 4, 1986).

103. *See* Human Rights Council, Revised Draft Convention on the Right to Development, U.N. Doc. A/HRC/WG.2/23/2, art. 1 (Apr. 6, 2022).

104. *Id.* at pmbl.

With respect to tax planning and tax avoidance, however, the Convention's early drafts were silent. Indeed, the working group tasked with drafting the Convention released their proposed treaty text in 2020, and this early draft made no mention of tax.[105] Moreover, the 2021 and 2022 reports of the Working Group responding to comments on the draft text and proposing amendments similarly included no discussion of tax and its relationship to development.[106]

This is puzzling because tax (at least as it relates to expanding state capacity) has been a part of the United Nations' sustainable development agenda for some time. Through the 2030 Agenda for Sustainable Development, for example, the U.N. General Assembly committed to "improve domestic capacity for tax and revenue collection" through "international support to developing countries."[107] Indeed, in the 2015 Addis Ababa Action Agenda, U.N. members affirmed their commitment to implementing the 2030 Sustainable Development Goals.[108] As part of the Action Agenda, U.N. members pledged to "reduce opportunities for tax avoidance" and "enhance disclosure practices and transparency in both source and destination countries . . . ."[109] U.N. members further promised to "make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created . . . ."[110]

The omission of the legal convergence of taxation, tax avoidance, and development from the draft convention on development began to be corrected in the 2022 draft text.[111] Indeed, the commentaries to the 2022 version acknowledge that the working group received a suggestion that its draft should hue more closely to the Addis Ababa Action Agenda's

105. Human Rights Council, Draft Convention on the Right to Development, U.N. Doc. A/HRC/WG.2/21/2 (Jan. 20, 2020).

106. Rep. of the Working Group on the Right to Development on Its Twenty-First Session, U.N. Doc. A/HRC/48/64 (June 30, 2021); Rep. of the Working Group on the Right to Development on Its Twenty-Second Session, U.N. Doc. A/HRC/51/38 (June 27, 2022).

107. G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Goal 17.1 (Sept. 25, 2015).

108. G.A. Res. 69/313, annex, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Aug. 17, 2015).

109. *Id.* ¶ 23.

110. *Id.*

111. Human Rights Council, Revised Draft Convention on the Right to Development with Commentaries, U.N. Doc. A/HRC/WG.2/23/2/Add.1 (May 16, 2022).

linkage of tax and development.[112] The working group therefore chose to insert a new clause whereby state parties pledge to cooperate to "create a social and international order conducive to the realization of the right to development" by, among other things, "[e]liminating illicit financial flows by combating tax evasion and corruption, reducing opportunities for tax avoidance, enhancing disclosure and transparency in financial transactions in both source and destination countries, and strengthening the recovery and return of stolen assets."[113] Accordingly, this draft clause combines within it both illegal or 'illicit' activities and undesirable activities which harm the capacity of states to attain their right to development. The commentaries have also linked corruption with taxation as an impediment to development. Consequently, the new text requires that states "[e]nsure financial integrity and transparency in international financial architecture, taxation and transactions."[114] Indeed, the inclusion of tax has largely been framed around curbing illicit activities, with tax avoidance being mentioned in the same section as other "illicit flows" and "anticorruption," seemingly to garner more widespread support from a variety of countries.[115]

The project is a work in progress and the working group tasked with bringing it to fruition may well release another amended draft after its 2023 summer meeting. Yet, the duty to combat tax avoidance is still framed in the Convention as one of the enforcement duties of the state, rather than as an internalized norm that companies may implement via notions of CSR. As such, the Convention drafters continue to overlook an important means of mobilizing corporate support for broader economic development. Part III will return to the right to development and suggest that it may properly constitute a value that should guide a company's CSR-informed choices regarding where it plans to pay tax.

D. OECD Global Minimum Tax

Since the advent of the digital economy, companies have found it much easier to operate across multiple jurisdictions and base profitable assets

112. *Id.* at 72 ("The Expert Drafting Group agrees with this suggestion and recommends relying on the language of paragraphs 23 and 25 of the Addis Ababa Action Agenda for the text.").

113. *Id.* art. 13(4)(j).

114. *Id.* art. 18(d).

115. G.A. Res. 69/313, annex, *supra* note 108, ¶ 23.

(like intellectual property rights) in low tax jurisdictions.[116] This kind of tax planning through locating paper profits in low-tax jurisdictions has come under intense scrutiny, particularly when the customers and activities that have generated these profits are located elsewhere in higher tax jurisdictions.[117] This is also a phenomenon that predates digitalization, but it is one that has been made more pressing and apparent by digitalization.[118]

To address these concerns, members of the OECD adopted the Base-Erosion-Profit-Shifting ("BEPS 1.0") framework agreement.[119] The agreement comprises 15 action items, including requiring companies to report with greater transparency how much tax they pay in each country in which they or a subsidiary operates or is registered (country-by-country reporting). Yet, though the initiative promised to revolutionize international tax, countries could not agree on a range of issues contained therein and so began to default to unilateral tax measures to collect from digital service providers.[120] BEPS 1.0 also did not seek to curb the ability of sophisticated tax planners to offer companies choices about where

116. *See* Assaf Harpaz, *Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy*, 46 YALE J. INT'L L. 57, 71 (2021); Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 705 (2011); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575–76 (2000) (contending that "[t]he mobility of capital has resulted in international tax competition, in which sovereign countries aim to attract both portfolio and direct investment by lowering their tax rates on income earned by foreigners").

117. Mason, *The Transformation of International Tax*, *supra* note 32, at 364–65, 395–96 (observing that "Social media, internet search, and streaming companies . . . extract huge profits from selling targeted advertisements and subscriptions, but user states cannot tax those profits because the companies avoid creating permanent establishments there"); Joseph Bankman et al., *Collecting the Rent: The Global Battle to Capture MNE Profits*, 72 TAX L. REV. 197, 198 (2020) (observing that "[a]lthough U.S. firms may have garnered the lion's share of the press in this context, this is by no means a phenomenon limited to U.S. Companies" and that "MNEs resident in other jurisdictions have likewise been charged with adopting organizational structures and planning that purportedly strips the tax base of local economies in illicit ways").

118. *See* Avi-Yonah et al., *A New Framework for Digital Taxation*, *supra* note 51, at 286.

119. *Base Erosion and Profit Shifting (BEPS): BEPS Actions*, OECD, https://www.oecd.org/tax/beps/beps-actions/ [https://perma.cc/M3PS-7FFH] (last visited Jan. 27, 2024).

120. Avi-Yonah et al., *A New Framework for Digital Taxation*, *supra* note 51, at 287. *But see* Mason, *The Transformation of International Tax*, *supra* note 32, at 353–54 (observing that "[a]cademics have harshly criticized BEPS," but arguing that "commentators have overlooked its more profound implications. In particular . . . major changes in the participants, agenda, institutions, norms, and legal instruments of international tax").

they paid tax. Instead its focus was tax minimization and tax avoidance through mechanisms such as the exploitation of tax treaty mismatches, outdated residency rules, tax secrecy, and a lack of transparency around how much tax companies pay in each country in which they operate (or, so-called country-by-country reporting).[121]

As a follow-up to the implementation of these action items, however, OECD members in 2021 endorsed a Two Pillar Approach (or, BEPS 2.0) to the redesign of international tax. Like BEPS 1.0, it is not clear whether this Two Pillar scheme will become an effective and fully operable reality in regulatory terms. Indeed, the OECD noted in its progress report issued in October 2022, with respect to the status of the implementation of Pillar One, that "further deliberation . . . is needed to properly finalise the design of innovative new rules . . . ."[122] Consequently, as one tax professor has observed more plainly, Pillar One is "stalled at present."[123] Yet, I discuss the Two Pillars here briefly so as to note both the emerging landscape of international tax and how companies will still retain a degree of discretion with respect to the way that they structure their tax payments by location.

Pillar One, at first, sought to address European concerns about big tech companies operating in their markets but not paying tax there. Such digital giants were able to accumulate millions of users (and associated revenue) from European markets, but they avoided creating a physical presence in such jurisdictions that would have triggered tax obligations.[124]

Pillar One responded to these issues by prescribing that "[r]evenue will be sourced to the end market jurisdictions where goods or services are

121. *BEPS Actions*, *supra* note 119; Mason, *The Transformation of International Tax*, *supra* note 32, at 382 (explaining that "nearly all the BEPS recommendations were designed to prevent corporate tax avoidance").

122. Org. for Econ. Coop. and Dev. [OECD], *OECD/G20 Inclusive Framework on BEPS: Progress Report September 2021-September 2022* (Oct. 4, 2022), https://web-archive.oecd.org/temp/2023-10-15/640865-oecd-g20-inclusive-framework-on-beps-progress-report-september-2021-september-2022.htm [https://perma.cc/EW8F-FDYL].

123. Kimberly A. Clausing et al., *Debating the Global Minimum Tax: Transcript*, Tax Notes, (Oct. 13, 2023), https://www.taxnotes.com/featured-analysis/debating-global-minimum-tax-transcript/2023/10/12/7hgc7 [https://perma.cc/66D9-LWR7].

124. *See* Ruth Mason, *The Fine Print on the Global Tax Deal: Domestic Politics Could Prevent Sweeping Reform*, Foreign Affairs (Nov. 8, 2021), https://www.foreignaffairs.com/articles/united-states/2021-11-08/fine-print-global-tax-deal [https://perma.cc/J2XR-W72K].

used or consumed."[125] As such, if fully implemented, the initiative will allow countries to tax a share of a company's profits based on the share of the company's global sales that occur in that country. Pillar One thus creates a new taxing entitlement for states by "severing the connection between tax and physical presence."[126] And, if implemented, it will apply to the most profitable companies world-wide, even though they are not among the digital giants originally targeted.[127]

This requirement has proven controversial, however. Indeed, the inputs that generate revenue are essential (for example, the rare earths that go into smartphones; or the assembly of certain companies), but these inputs are often located in developing countries; while the end market or place of use or consumption is in a wealthy jurisdiction. As such, forcing revenue to be assigned accordingly would effectively tip the scales and require companies to pay tax in developed countries where such goods and services are overwhelmingly consumed. At this time, there remain serious concerns from states, and their unilateral measures may continue to operate to hinder implementation of the cooperative option that Pillar One purportedly represents.[128]

Pillar Two of the new framework, however, has received more widespread support. Pillar Two constitutes the so-called Global Minimum Tax and sets the minimum tax rate at 15%. As such, companies will pay this 15% tax rate *somewhere* if the proposal is fully implemented. Accordingly, even if countries offer a lower tax rate as an incentive for companies, the country of the parent company may collect the difference between that lower rate and the 15% floor. Through the Global anti-Base Erosion Rules ("GloBE") Pillar Two provides that countries may impose a

125. Org. for Econ. Coop. and Dev. [OECD] & Group of 20 [G20], *Base Erosion and Profit Shifting Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, at 2 (Oct. 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [https://perma.cc/M5ZT-H827].

126. Mason, *The Fine Print*, *supra* note 124, at 4.

127. Avi-Yonah et al., *A New Framework for Digital Taxation*, *supra* note 51, at 290 (noting that "Pillar One no longer solely targets the digital economy" and that "[i]t rather targets any business sector that meets its revenue threshold and profitability, even if the business is not part of the digital sector").

128. *See* David E. Spencer, *The International Tax Architecture: Titanic Changes Ahead?*, 34 J. INT'L TAX'N 35, 36–38 (2023); Avi-Yonah et al., *A New Framework for Digital Taxation*, *supra* note 51, at 293 (discussing critiques and opposition to Pillar One); Harpaz, *supra* note 116, at 92.

"top-up tax" on a parent entity if a subsidiary's income is taxed at below this 15% floor.[129] The intention is not to limit where companies can pay tax, but to render this choice moot on purely financial grounds. Pillar Two is thus intended to reduce tax competition among states, but it does not eliminate corporate choice about where such tax will be paid.[130]

According to the OECD, the Two Pillar solution has garnered the support of 139 member jurisdictions as of June 9, 2023.[131] Even if not fully operationalized in terms of formal, binding law, if the new criteria become established as default investor expectations and incorporated into the ratings criteria discussed later, it may have significant force in shaping business choices with respect to tax planning.

E. U.N. Tax Convention

Developing states have been dissatisfied with the leading role of the OECD in renovating the legal infrastructure of international tax for some time now.[132] These states have argued that the OECD only represents the interests of wealthy states and that a more appropriate forum for hammering out any new multilateral tax agreement is the United Nations.[133]

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129. OECD & G20, *supra* note 125, at 3–4; Ruth Mason, *A Wrench in GLOBE's Diabolical Machinery*, 107 Tax Notes Int'l 1391, 4 (2022); Avi-Yonah et al., *A New Framework for Digital Taxation*, *supra* note 51, at 296 (explaining the workings of Pillar Two).

130. Mason, *The Transformation of International Tax*, *supra* note 32, at 387 (asserting that "CFC and other types of minimum-tax rules seem more concerned with *whether* companies pay tax than *where* they pay tax" and that "[t]he concept of full taxation says that income should not go untaxed, but it does not specify *where* it should be taxed").

131. Org. for Econ. Coop. and Dev. [OECD], *Members of the OECD/G20 Inclusive Framework on BEPS Joining the October 2021 Statement on a Two Pillar Solution to Address the Tax Challenges Arising from the Digitialisation of the Economy as of 9 June 2023* (2023), https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf [https://perma.cc/8FV3-EHAM].

132. *See* U.N. Secretary-General, *supra* note 55, ¶¶ 31–34 (asserting that OECD member countries are "in the category of 'upper-middle income economy' or 'high-income economy', as defined by the World Bank," that "none of them are least developed countries, landlocked developing countries or small island developing States," that "[m]ost States members of OECD are from Europe and the Americas, while none are from Africa," that "the OECD guidance is adopted much more widely in the developed countries than by developing countries," and that there is a "perception among developing countries that the expected benefit from the proposed [OECD] reforms will be minimal, especially when compared to the cost of implementation").

133. *Id.*; *see also* Cees Peters, *The Legitimacy of the OECD's Work on Pillar Two: An Analysis of the Overconfidence in a 'Devilish Logic'*, 51 Intertax 554, 555 (2023) (arguing

Accordingly, on December 22, 2023, the U.N. General Assembly adopted a resolution put forward by Nigeria (on behalf of the Group of African States) to establish a committee to draft a U.N. framework convention on international tax cooperation.[134] Support and opposition to the resolution largely represented the divide between developing states voting in favor and developed states voting against or abstaining.[135]

As work has just begun on drafting the U.N. Convention, it is unclear what the final text will contain. Like the OECD Two-Pillar framework, however, this U.N. framework convention has not yet been said to address or consider the potential contribution of CSR with respect to tax planning. Indeed, in the documents so far promulgated by the U.N. drafting process, companies are discussed as the enemy, engaging in harmful tax avoidance and tax evasion.[136]

Yet, as this Article has argued previously, companies may be brought in to contribute to constructive responses to ongoing problems. If we care about maximizing state capacity and also acknowledge existing constraints on tax enforcement, it is resource-intensive to treat companies

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that the OECD "is concentrating more explicitly on output legitimacy and throughput legitimacy rather than on the democratic need for input legitimacy").

134. G.A. Res. 78/230 (Dec. 28, 2023); Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, U.N. Doc. A/C.2/78/L.18/Rev.1 (Nov. 15, 2023).

135. *See, e.g.*, Press Release, General Assembly, Second Committee Approves Nine Draft Resolutions, Including Texts on International Tax Cooperation, External Debt, Global Climate, Poverty Eradication, U.N. Doc. GA/EF/3597 (Nov. 22, 2023) (relaying votes for and against the draft resolution introduced by Nigeria and describing votes rejecting an amendment put forward by the United Kingdom); Press Release, African Union, African Group Chair Speaks to the Press on "Framework Convention on International Tax," Tabled for Vote This Week at the UN (Nov. 19, 2023), https://au.int/en/pressreleases/20231119/african-group-chair-speaks-press-framework-convention-international-tax [https://perma.cc/7WXM-SRFB] (quoting the Chair of the African Group at the UN asserting that "this Framework Convention is not merely a policy document; it is a beacon of hope for developing countries that have long sought a voice in the shaping of international tax norms"); Press Release, United States Mission to the United Nations, Explanation of Position on a Second Committee Resolution on the Promotion of Inclusive and Effective International Tax Cooperation (Nov. 23, 2022) (stating U.S. opposition to the U.N. developing its own tax convention and arguing that "[i]t is simply not consistent with implementation of the [OECD's] Two-Pillar Solution to decide to begin intergovernmental discussions at the United Nations on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options").

136. *See* U.N. Secretary-General, *supra* note 55, ¶¶ 5, 39, 71; *see also* Rep. of the Econ. & Soc. Council, U.N. Doc. E/2024/45-E/C.18/2023/4 (2023).

as enemies and to have to enforce rules in a way that presumes that companies will thwart them at every turn. Indeed, if a concern among developing countries is to preserve scant resources for other priorities, one might expect a process that more thoroughly engages companies and encourages their buy-in.

F. Standards and Ratings

Just as this Article urges that we think more deeply about private entities internalizing and applying norms, this Section considers alternative methods of norm enforcement via industry standards and ESG ratings intended to inform investor decision-making.[137] Indeed, whether the Global Minimum Tax is operationalized fully may not matter as much if standards and rating agencies incorporate it as a standard for evaluating companies. This informal means of lawmaking may allow for the enforcement of the Global Minimum Tax as a standard, not a rule, that is carried out and made effective by private rather than public actors. Of course, private enforcement and public enforcement differ in terms of legitimacy and, arguably, effectiveness in terms of their ability to cajole, coerce, and guide behavior. Yet, in a context where the world cannot fully agree on operationalizing a particular tax rule, private enforcement may allow for the effectiveness of a new or emerging norm.

In this regard, there are emerging developments that ought to be considered. First, in March 2023, the FASB proposed the adoption of a new standard with respect to accounting practices and disclosure of income tax paid.[138] The draft standard's main change regards the detail of rate reconciliation that is required.[139] The draft standard would require public business entities to "disclose a tabular reconciliation, using both

137. Fin. Acct. Standards Bd., Income Taxes (Topic 740): Improvements to Income Tax Disclosures (Mar. 15, 2023) (exposure draft for comments), https://fasb.org/page/ShowPdf?path=Proposed%20Accounting%20Standards%20Update%E2%80%94Income%20Taxes%20(Topic%20740)%E2%80%94Improvements%20to%20Income%20Tax%20Disclosures.pdf&title=Proposed%20Accounting%20Standards%20Update%E2%80%94Income%20Taxes%20(Topic%20740):%20Improvements%20to%20Income%20Tax%20Disclosure [https://perma.cc/57T5-ZQE9] (observing that "[t]he amendments in this proposed Update would address investor requests for more transparency about income tax information through improvements to income tax disclosures primarily related to the rate reconciliation and income taxes paid information").

138. *Id.*

139. *Id.* at 2.

percentages and reporting currency amounts" regarding taxes "disaggregated by nature" and "disaggregated by jurisdiction."[140]

A form of greater transparency with respect to corporate tax affairs was also enshrined by the GRI when it adopted Standard 207 in 2019. Standard 207 provides for four core disclosures. The first three relate to management's approach to tax, tax control, and tax strategy, and the fourth requires country-by-country reporting.[141] In a recent interview, the CEO of the GRI, Eelco van der Enden, noted that these changes to provide greater tax transparency were actually driven by U.S. investors. He noted that these investors "wanted to see more detailed information on tax, because it told them something about the risk appetite, about the quality of the profits themselves, and about the link between the sustainability policy companies have, and tax . . . ."[142]

This increased tax transparency would also provide for the kind of country-by-country reporting that has long been on the agenda of activists. It will likely allow those scrutinizing such figures to compare a company's tax payments with its business revenue and customer base in different jurisdictions and thereby make the case, for example, that the business is not paying sufficient tax.[143] But, this greater transparency with respect to country-by-country reporting may also effectuate crucial scrutiny about where companies pay tax and the alignment of these payments with companies' CSR-informed values.[144]

Additionally, though the OECD's Guidelines for Multinational Enterprises on Responsible Business Conduct have been influential in shaping

140. *Id.*

141. Glob. Sustainability Standards Bd., *supra* note 17, at 2.

142. David D. Stewart et al., *ESG's Biggest Champion Talks Transparency and Reporting*, Tax Notes (Jan. 27, 2024), https://www.taxnotes.com/tax-notes-live/tax-notes-talk/esgs-biggest-champion-talks-tax-transparency-and-reporting/7d5yh?utm_term=&utm_source=google&utm_campaign=Campaign+19&utm_medium=cpc&hsa_src=g&hsa_acc=3287128132&hsa_ver=3&hsa_mt=&hsa_tgt=dsa-761510096127&hsa_grp=71740048255&hsa_kw=&hsa_cam=2022302601&hsa_net=adwords&hsa_ad=456565051675&gclid=CjwKCAjw_uGmBhBREiwAeOfsdzaIvxA9u_w9U6DdFbonyMjmqWDSVf6PiNxaHSIGDbpNdeOaH3cH4xoCOR8QAvD_BwE [https://perma.cc/MZ6F-HNRC].

143. Fin. Acct. Standards Bd., *supra* note 137, at 4 (noting that "[t]he proposed amendments would allow investors to better assess, in their capital allocation decisions, how an entity's worldwide operations and related tax risks and tax planning and operational opportunities affect its income tax rate and prospects for future cash flows").

144. *See* Chaim & Parchomovsky, *supra* note 21, at 797, 815–16.

corporate codes of conduct with respect to social obligations in other areas, they have received less attention with respect to tax.[145] In an environment in which CSR and tax are increasingly being discussed together by external standard setters, this may begin to change, however. Indeed, the OECD Guidelines contain a brief mention of tax. The Guidelines urge companies to "comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate."[146] Complying with the spirit of tax laws, "means discerning and following the intention of the legislature," but it does not require "payment in excess of the amount legally required pursuant to such an interpretation."[147]

It remains unclear exactly what this 'spirit' criteria is meant to capture. Yet, that criteria has now also been endorsed by the European Union's group of technical experts on sustainable finance, its Platform on Sustainable Finance, in that group's so-called 'minimum safeguards' for sustainable investing. The minimum safeguards will eventually provide essential elements for an investment to qualify as sustainable under new EU rules or the so-called Taxonomy Regulation. In guidance on these minimum safeguards, the Platform observes that "Article 18 of the TR [Taxonomy Regulation] is to prevent green investments from being labelled and regarded as 'sustainable' when they . . . are linked to non-compliance with letter or spirit of tax laws . . . ."[148] The Platform notes that the topic of taxation is not considered in the Corporate Sustainability Reporting Directive, discussed earlier, but that "the identification of procedures that are relevant for establishing compliance with the MS [minimum safeguards] can follow the analytical process proposed for human rights and corruption, by considering OECD MNE Guidelines."[149] It then quotes and endorses the application of the 'letter and spirit' requirement from the OECD MNE Guidelines. As such, though tax was not included in the sweeping changes brought in by the Corporate Sustainability Reporting Directive, the 'letter and spirit' criteria from the OECD's Guidelines may well be imported into the EU's

145. *See generally* George, *supra* note 25.
146. Org. for Econ. Coop. and Dev. [OECD], *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, at 51, OECD Publishing (2023), https://doi.org/10.1787/81f92357-en [https://perma.cc/SC9K-H8NM].
147. *Id.*
148. EU Platform on Sustainable Fin., *supra* note 82, at 6.
149. *Id.* at 49.

regulatory environment to determine whether a particular investment qualifies as sustainable.

In addition to these changes on the horizon, private ESG ratings agencies have an important role to play. Such agencies rate investments based on their contribution to ESG priorities and serve as a benchmark for individual and institutional investors seeking to ensure that their capital has a positive social impact.[150] Several important ESG ratings agencies now also include tax and tax transparency as an aspect of their evaluative criteria for the companies that they assess.[151] Accordingly, though greater tax transparency may be understood as an end in and of itself by those seeking to evaluate 'how much' tax companies pay on a worldwide basis, it may function as well to enable the kind of examination and CSR-informed reorientation of company conduct as measured by 'where' the company's tax planning has routed such tax payments.

III. Missing Pieces

This Part proposes two puzzle pieces that might aid in bridging the current disjunct between tax and CSR. First, it asserts that we should take companies seriously in terms of the discretion that they retain with respect to international tax. Doing so updates for changes in thinking with respect to both the role and evolving responsibilities of companies in the use of their discretion as actors and not just targets of law. Second, it proposes that, to the extent that companies retain discretion despite the vast changes on the horizon in international tax, it may be worthwhile

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150. *See* Nicole R. Hovatter, *Defending ESG: A New Standard of Review for Defensive Measures that Impact ESG Ratings*, 171 U. Pa. L. Rev. 203, 218 (2022) ("Today, ratings are increasingly relied upon by institutional investors, asset managers, and individual stakeholders in assessing a company's ESG performance, and ratings often form the basis of shareholder engagement with companies on ESG matters."); *cf.* Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 Berkeley Bus. L.J. 258, 274 (2022) (urging that "it simply is not possible to objectively measure a company's performance using ESG ratings" and that "[t]here is no standard, accepted metric for evaluating a company's ESG performance"). *See generally* Quinn Curtis et al., *Do ESG Funds Deliver on Their Promises?*, 120 Mich. L. Rev. 393 (2021); Emilie Aguirre, *Beyond Profit,* 54 U.C. Davis L. Rev. 2077 (2021).

151. *See, e.g.*, Sustainalytics, The ESG Risk Ratings (2021), https://connect.sustainalytics.com/hubfs/INV/MEI/Business-Ethics-Backgrounder_Final.pdf [https://perma.cc/RU5M-F2L3]; *ESG Industry Materiality Map*, MSCI, https://www.msci.com/our-solutions/esg-investing/esg-industry-materiality-map [https://perma.cc/89T8-LFER] (last visited Jan. 27, 2024).

to think more deeply about how CSR, and particularly CSR norms of human rights, development and the environment, might inform and shape the exercise of this discretion.[152]

CSR is easily criticized as a naïve and ineffectual diversion from government regulation.[153] This Article is clear-eyed in acknowledging the field's limitations and challenges, and it does so even more explicitly in Part IV. Yet, in the context of international legal coordination, wherein the rules are in flux and governments have yet to fill all possible gaps, it posits that there may still be value in taking seriously the notion that some companies commit to certain norms and that these may guide their choices, even in an area that involves tangible profits and losses like tax.

This Part suggests that we not dismiss corporate tax commitments as empty words without further engagement. To the extent that companies have begun to invoke the language of social responsibility and sustainability in the context of tax, this section considers how companies may add substance to the application of these pledges so as to deploy CSR to inform their tax planning choices.

A. *Taking Companies Seriously*

International tax has long been framed as a kind of cat and mouse game.[154] States and international organizations adopt tax rules, and multinational corporations try to evade the force of these rules by finding loopholes to minimize their global tax bill. States and international organizations then seek to tighten the rules and close these gaps. Officials congratulate each other on particularly innovative regulatory schemes to ensnare companies, and companies adapt with increasingly complex and inventive means around these new rules.[155] On and on it goes.

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152. Here, I acknowledge and am guided by the inclusion of these norms in the definition of "corporate social responsibility" in international agreements concluded by Brazil and India. *See, e.g.,* Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, *supra* note 27.

153. Bebchuk & Tallarita, *supra* note 7, at 96 (arguing that "[w]hile stakeholderism would not produce material benefits for stakeholders, it would introduce illusory hopes, misperceptions, and distractions that would have significant adverse effects on stakeholders").

154. *See, e.g.*, Darren Rosenblum, *The Futility of Walls: How Traveling Corporations Threaten State Sovereignty*, 93 Tul. L. Rev. 645, 660 (2019).

155. *See, e.g.*, Mason, *A Wrench in GLOBE's Diabolical Machinery*, *supra* note 12, at 1391 (recounting scholars and officials that spoke admiringly of the "diabolical engineering" and "devilish logic" of a recently enacted international tax scheme).

A drawback of this sort of oppositional dynamic is that it imbues only one side (state-based actors) with a sense of responsibility for law. Companies are able to skate by on the basis of their bare compliance with the rules, satisfied to do whatever they can 'get away with.'

Additionally, that worldview fails to update for the CSR or ESG revolution that has swept through business.[156] As business is pressed to do more than the bare minimum that law requires, it is important that we engage more openly with how business, inflected with a sense of social responsibility, may and should respond and relate to law; here, international tax law.

The process of inculcating within business a sense of responsibility for law has been under way in other areas of international law for some time now.[157] Globalization means that multinational corporations may operate or otherwise conduct business activities in countries that are either unable or unwilling to enforce international norms concerning human rights, the proper treatment of workers, and environmental conservation. Working within the bounds of state-led enforcement alone has proven insufficient to attain the outcomes intended in such scenarios. Indeed, international officials and human rights activists have sometimes found that relying on the relevant state to issue commands to businesses and enforce them does not adequately guarantee lawful outcomes. As John Ruggie, the U.N. Secretary-General's special representative on human rights and transnational corporations, observed some time ago in the context of international human rights law, business will often be able to find and exploit global governance gaps.[158] Governance gaps are areas in which states either lack the capacity or the will to enforce human rights law against corporate wrongdoing. Ruggie recognized that companies should also be encouraged to internalize human rights norms to

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156. Fairfax, *supra* note 13, at 1165 (2022) (affirming that "[o]ne of the most significant recent phenomena in corporate governance is the outspoken embrace of the view that corporations should operate in a manner that benefits society and all of the corporations' stakeholders"); Aguirre, *supra* note 150, at 2081 (observing that "[c]ompanies with objectives beyond profit offer significant potential for social and economic impact"); ADEFOLAKE O. ADEYEYE, CORPORATE SOCIAL RESPONSIBILITY OF MULTINATIONAL CORPORATIONS IN DEVELOPING COUNTRIES: PERSPECTIVES ON ANTI-CORRUPTION 10 (2012) (contending that "[t]he emerging school of thought is shifting noticeably towards the concept of corporate social responsibility").

157. *See generally* Parella, *International Law in the Boardroom*, *supra* note 35; Butler, *Corporate Commitment to International Law*, *supra* note 93.

158. *See* Ruggie, *Business and Human Rights*, *supra* note 89.

guide their behavior. He argued that, while states have the primary rule-making function in the international legal environment, companies too play an important role in ensuring 'respect' for these rules in their own conduct and the conduct of others; it was this position that was eventually enshrined in the U.N.'s Guiding Principles on Business and Human Rights.[159]

This dynamic of internalization is especially important when companies operate in states that lack enforcement capacity. As such, if the company can determine that its conduct is contrary to a legal rule, it should not require the public bureaucracy in that jurisdiction to tell it to change. Instead, the company acting with an internalized sense of the relevant rules ought to adopt lawful practices of its own accord.[160] This does not exclude the value and effectiveness of external mechanisms of enforcement, either through traditional state-based punishment or market-based sanction via reputational damage. As such, this Section builds on Ruggie's insights and applies them to the context of international tax in order to illustrate the potential of fostering within companies a sense of responsibility for international tax.

Taking companies seriously as actors in the space of international tax arguably requires that we take at least two conceptual steps.

First, we should be open about the fact that companies retain a degree of discretion. Despite the various international tax reforms outlined above and ongoing, companies still choose where to do business (in terms of where to establish a physical presence, where to make sales and seek customers, and so forth) and these choices have significant tax consequences. Moreover, despite these retained choices, sophisticated tax planning also still enables companies to retain a significant amount of discretion with respect to where they pay tax.[161]

There are many ways that companies can manipulate where they pay tax. Multinationals have long been criticized for utilizing these choices to minimize their tax obligations.[162] These schemes often function on the basis of realizing profit in low tax jurisdictions and bearing costs

159. U.N. Off. of the High Comm'r, *supra* note 97, at 13–15.

160. *See generally* Butler, *supra* note 93, at 439.

161. *See* Mason, *The Transformation of International Tax*, *supra* note 32, at 387.

162. *How Do Corporations Abuse Tax?*, Tax Justice Network, https://taxjustice.net/faq/how-do-corporations-abuse-tax/ [https://perma.cc/QE4L-36ZH] (last visited Nov. 11, 2024); Andrea Miller, *How Companies Like Amazon, Nike and FedEx Avoid Paying Federal Taxes*, CNBC (Apr. 14, 2022), https://www.cnbc.com/2022/04/14/

in high tax jurisdictions. Valuable intellectual property, for example, is held by a subsidiary incorporated in a low tax jurisdiction and licensed to other subsidiaries in the multinational group that operate in high tax jurisdictions. The revenue collected when licensees pay to use the intellectual property becomes profit realized in the low tax jurisdiction where its holder is incorporated, and the cost of that license offsets and reduces profits that otherwise would be taxed from the subsidiaries in high tax jurisdictions.[163] States have targeted these schemes in various iterations of the cat and mouse dynamic described above. And, with the implementation of the Global Minimum Tax discussed earlier, these schemes will be less likely to result in zero tax (or, pure 'tax avoidance') but payment of the 15% tax minimum. There has also been significant movement toward mandatory country-by-country reporting to make transparent how corporations are spreading their tax payments globally.[164] But this need not be the only approach.

Recognizing and seeking to work with discretion rather than merely trying to erase or ignore it is critical for CSR to operate to guide this discretion. Discretion is something of a double-edged sword, however. While companies may wish to retain it quietly, it may be that they do not wish for others to know that they possess it. Indeed, a broader understanding that company decisions are not merely dictated by rules adopted by others then requires that we further interrogate the choices that companies make. When large energy companies were recently pressed on their tax practices and a lack of transparency, for example, their reply was to reject any discretion in their tax planning and affirm that they merely "[comply] with all applicable tax laws."[165]

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how-companies-like-amazon-nike-and-fedex-avoid-paying-federal-taxes-.html [https://perma.cc/Z8BF-RSLB].

163. Simeon Djankov, *How Do Companies Avoid Paying International Taxes?*, PETERSON INST. FOR INT'L ECON. (Sept. 3, 2021), https://www.piie.com/blogs/realtime-economics/2021/how-do-companies-avoid-paying-international-taxes [https://perma.cc/62A9-U888].

164. Chaim & Parchomovsky, *supra* note 21, at 815–32 (arguing that "[a] significant stride in the right direction would be to require corporations to make their tax payments transparent").

165. *See* Sam Meredith, *U.S. Oil Giants Exxon Mobil, Chevron and ConocoPhillips Challenged over 'Secretive' Tax Practice*, CNBC (Nov. 21, 2022), https://www.cnbc.com/2022/11/21/exxon-mobil-chevron-and-conocophillips-challenged-over-tax-practices.html [https://perma.cc/6SPH-BRVN] (quoting a spokesperson for Chevron); *see also Global Tax Policy*, CONOCOPHILLIPS, https://www.conocophillips.com/sustainability/integrating-sustainability/sustainable-development-governance/

Doreen Lustig has convincingly traced this dynamic in other areas of international law that obscure the key role and power of corporations, and we can recognize and grapple further with that dynamic in the context of international tax.[166] Corporate discretion therefore becomes something that neither government officials nor companies themselves wish to admit. It seems to make governments look weaker and it might lead to calls for greater responsibility with respect to company decision makers if more widely publicized. But it is there, and we should not overlook it in considering how corporate social responsibility in other areas of business decision-making may impact corporate tax planning.

Because responsible taxation is an emerging phenomenon, it is not yet fully clear how significant it is as a development for influencing corporate tax strategy in real money terms. Measuring these effects over future years is a question that I highlight, but one that I leave here for others. As companies become more transparent in both their approach to tax strategy and the amount of tax that they pay in each of the countries in which they operate or otherwise have ties, such projects will have more disclosures from which to draw insights.

Skeptics might point out that it is well and good for companies to make commitments to be more socially responsible with their tax strategy, but that at the end of the day, this is merely a distraction intended to obscure the fact that the real substance of these tax behaviors has not changed.[167] There is great merit in this skepticism. However, that does not mean that we should entirely ignore the potential of a supplemental approach.

I have argued elsewhere that these corporate commitments are themselves significant, because they sometimes result in real changes. And, even if they do not result in immediate changes in behavior, they are also consequential because they provide a standard for evaluating such corporate behavior and coalescing external and internal pressure. These

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policies-positions/global-tax-policy/ [https://perma.cc/KP7M-2N9S] (last visited Nov. 11, 2024) (affirming that "ConocoPhillips complies with the tax requirements in all jurisdictions where we operate").

166. Doreen Lustig, Veiled Power: International Law and the Private Corporation 1886-1981 221–25 (2020).

167. Prem Sikka, *Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance*, 34 Acct. F. 153, 154 (2010) (asserting that "[m]ajor corporations increasingly produce brochures and reporting containing promises of socially responsible conduct, but this has also been accompanied by large scale tax avoidance and evasion").

commitments also provide a standard around which competitors in the area may coalesce, so that the behavior becomes a peer-pressure point for understanding what it is to operate in accordance with best practice.[168] When a company announces the standard by which it is committing to be evaluated, this allows us to skip questions around whether such a standard applies to them at all and instead focus on whether the company's behavior really lives up to the proclaimed objective that the company has chosen to embrace. If we entirely ignore the possibility that these commitments may influence corporate behavior, we overlook a whole area of business practice, rich with potential significance and ongoing questions.[169]

Relatedly, responsibility should be accompanied by accountability such that companies are not allowed to utilize their discretion in any way that they see fit or in a manner that undermines general values of the international system. Aligning discretion to the aims of social responsibility is an exercise in justification that is also aided by a degree of independent or external review, like the ESG ratings projects highlighted earlier.[170]

When sovereign states commit to enforce various human rights norms, for example, many also submit to regular review within the formalized process of the U.N. Office of the High Commissioner for Human Rights' Universal Periodic Review.[171] Within this process, states submit regular reports on their compliance and implementation of various treaty norms which are then evaluated and discussed by the relevant treaty committee. The committee then comments publicly on the report and offers ways that the state being reviewed may do better. This process forms a focal point for activists seeking to pressure states to do better, but it also forces the state under review to reflect on and defend its choices before an international audience.

In the context of corporate conduct within the space of CSR, the procedures similarly should not allow solely for complete corporate discretion absent outside scrutiny and justification. Indeed, this is one of the important developments within CSR that has brought the field further away from pure philanthropy and closer to a form of quasi-legal obligation.

168. Butler, *Corporate Commitment to International Law*, *supra* note 93, at 438.

169. *See* Parella, *International Law in the Boardroom*, *supra* note 35, at 845–46; Butler, *Corporate Commitment to International Law*, *supra* note 93, at 439–40.

170. *See* Parella, *International Law in the Boardroom*, *supra* note 35, at 850–51, 895–96.

171. Human Rights Council Res. 5/1, annex, U.N. Doc. A/HRC/RES/5/1, ¶¶ 1–4 (June 18, 2007).

Accordingly, it is insufficient for a company to assert that a particular practice is CSR-aligned merely because the company makes such a declaration. Instead, companies are now subject to various ratings and reviews by private ratings agencies and standard setters like the FASB and GRI that are intent on moving to require greater tax transparency. The information provided assists investors to make decisions about the prospect of investing in a company. And it may enable investors to discipline companies that are not acting in a socially responsible manner with respect to their tax planning. Accordingly, the external review function is present with respect to company behavior and CSR. Thus, as these ratings standards begin to include tax into their evaluation, this may allow for a forum for the evaluation and accountability of companies with respect to how companies pursue tax strategies that are aligned with CSR.

As such, the means are beginning to come into place to ensure that companies' discretion in the tax space is both recognized and ordered within the paradigm of CSR. But, to make this even more effective, the next Section will argue that we should not focus solely on the question of how much tax companies are paying, but also on how they are utilizing their discretion to inform where to pay tax.

B. *CSR and the Question of Where*

In 2018, the CEO of Google, Sundar Pichai, announced at the World Economic Forum in Davos that his company would be "happy to pay a higher amount of tax."[172] Pichai argued there that the ongoing debate over global tax is "not an issue about the amount of tax we pay," but that it is instead about "how you divide it among various countries."[173] Pichai's comment raises a vital question for the emerging global tax infrastructure as it intersects with CSR. Where ought companies pay tax?

This Section articulates how CSR might appropriately inform a company's decision as to where it pays tax. Just as CSR currently factors into a company's choices regarding where it does business, this Section takes seriously the possibility that CSR may also begin to guide where companies choose to pay tax.

172. Graeme Wearden & Larry Elliott, *Google CEO: We're Happy to Pay More Tax*, THE GUARDIAN (Jan. 24, 2018), https://www.theguardian.com/technology/2018/jan/24/google-ceo-were-happy-to-pay-more-tax [https://perma.cc/46ZL-S2JG].

173. *Id.*

Of course, these choices are not limitless, as they are constrained by governmental regulation. Sometimes countries sanction other countries by forbidding their corporate nationals to do business there. And, as Ashley Deeks and Andrew Hayashi have recently highlighted, tax policy may also be mobilized for economic sanctioning; thereby restricting corporate choice.[174] Yet, companies retain a significant measure of discretion despite these governmental restraints, and it is exactly in this sphere of discretion that we should think about the order and guidance that CSR may bring to bear.

1. Human Rights

Ensuring that companies take human rights into account in their decision-making and making sure that they are held liable when their conduct subverts human rights is the dual-pronged focus of modern international law around corporate accountability.[175] As such, corporations must not directly perform, be complicit in, or contribute to human rights violations. This principle is well established in domestic case law in jurisdictions around the world,[176] and it is one likely to be included in the final draft of the Business and Human Rights Treaty discussed earlier.[177]

The principle that a business should be held to account for human rights violations—even if not directly committed by the company itself—has also been affirmed in the due diligence statutes that certain states have adopted.[178] These due diligence statutes seek to ensure that companies cannot absolve themselves of liability by arguing that the wrongful acts in question were committed by another associated actor (whether the company's subsidiary or supply chain partner) if the company ought to have known or could easily have uncovered through appropriate investigation the poor rights record of its business partners.[179] Moreover,

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174. Ashley Deeks & Andrew Hayashi, *Tax Law as Foreign Policy*, 170 U. PA. L. REV. 275, 316 (2022).

175. GEORGE, *supra* note 25, at 29, 33.

176. *Id.*

177. Business and Human Rights Treaty 2023 Draft, *supra* note 101.

178. *See, e.g.*, Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive 2019/1937 and Regulation 2023/2859, 2024 O.J. (L 1760). *See generally* PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 539–43 (3d ed. 2021) (discussing the adoption of laws combating modern slavery).

179. *See* MUCHLINSKI, *supra* note 178, at 533.

companies have committed themselves through their own codes of conduct in supervising their supply chain partners to ensure that they train supply chain partners in human rights compliant practices.[180]

As such, CSR seeks to ensure that corporate choice is guided by human rights. Companies should take the human rights practice and record of the jurisdictions in which they do business, along with that of the other entities with which they partner, into account in ordering their operations. And they must take the human rights impact of their own actions into consideration. The power of companies is an ever-present concern.[181] But this is a power that companies utilize already to extract all sorts of concessions and special privileges from the states in which they are considering operating. Adding human rights to these decisions requires that companies consider and justify their conduct according to a paradigm beyond merely their own profit or advantage.

This Subsection suggests extending this existing and evolving understanding of how human rights informs business practice further. This next step allows us to acknowledge that tax planning has enabled companies to have a degree of choice not just about where to do business and with whom, but also about where and to whom they pay tax. This choice is not absolute, of course. But, to the extent that tax planning enables companies to exercise a degree of discretion with respect to where they pay tax, this discretion, like other corporate choices currently under scrutiny, should be informed by human rights considerations.

Companies facing tax planning choices may be guided by human rights-informed thinking in two ways. First, to the extent lawfully possible, companies *should not contribute*—pay tax—to states with a poor human rights record. Second, companies *should not deprive*—unduly withhold or minimize tax payments through aggressive tax planning—from states the revenue necessary for states to fulfill socio-economic rights guarantees.

The first prong, not contributing to states with a poor human rights record, is likely less controversial than the second. Companies already

180. *See* GEORGE, *supra* note 25, at 305–21; *see, e.g.*, MICROSOFT, MICROSOFT SUPPLIER CODE OF CONDUCT (July 2024) (2024), https://cdn-dynmedia-1.microsoft.com/is/content/microsoftcorp/microsoft/accex/documents/presentations/Microsoft%20Supplier%20Code%20of%20Conduct.pdf [https://perma.cc/DHQ4-9433].

181. GEORGE, *supra* note 25, at 29 (observing that "[t]he growing power of the modern multinational corporation brings with it an increased potential to advance or undermine respect for the protection of human rights and the environment").

consider the human rights records of other business actors with whom they contract and jurisdictions in which they undertake operations.[182] The second prong suggests that we recognize the voluntariness that sophisticated tax planning provides. In this way, we might import a factor—human rights—that already guides corporate choice in the space of contract into company decisions with respect to tax.

Questions about how these decisions might be operationalized and questions of balancing or judgment in evaluating a state with a good but imperfect human rights record are questions that companies already face with respect to their contractual choices around the location of operations and the selection of business partners. There are many external sources that can guide this kind of corporate evaluation and there need not always be one right answer regarding what the company should do. Moreover, it may be that the company determines that its non-payment of tax in a low-resource jurisdiction may itself lead to or worsen human rights violations there because the state simply cannot afford to comply with human rights obligations. This may be better determined on a case-by-case basis with the state's aspirations either to implement or subvert human rights central to the company's analysis.

Human rights might then operate as a prong in the decision-making process with respect to tax planning so that companies are expected to justify their conduct and reason publicly with respect to human rights in the sphere of tax planning as they do already in other areas of their business operations. The suggestion is that, just as human rights informed thinking has begun to permeate other areas of business decision-making, we should not wall off the tax department by pretending that a company is required to pay a certain amount in or to a certain place and thereby ignore the choices that sophisticated tax planning provides to business executives.

The possibility of companies utilizing this sort of tax planning discretion to withhold support from human rights violators is arguably contemplated in the U.N. Guiding Principles framework for business and human rights. The U.N. Guiding Principles urge that a business should be expected to exert its "leverage" or influence in order to secure human rights-compliant outcomes.[183] It is time we think about leverage as a mechanism of influence not just implemented through the choice

182. Parella, *International Law in the Boardroom*, *supra* note 35, at 868–74.
183. U.N. Off. of the High Comm'r, *supra* note 97, at 20–22.

of where to do business, but also as one that encompasses the choice of where to pay tax. As such, we may consider business leverage in support of human rights being exerted not just against other private actors, but also against states.

A key advantage of thinking about tax planning as a form of corporate leverage in aid of human rights is that tax planning is nimble. Through shifting paper profits, for example, companies can respond quickly to a changing human rights landscape in a manner potentially easier to implement than, say, moving a factory or natural resource extraction site.

In the earliest iterations of his reports, Ruggie contemplated leverage exercised against states.[184] But, he seemed to pull back from that possibility after criticism from state actors.[185] The final version of his report which formed the basis for the U.N. Guiding Principles instead articulates leverage as a device to be used solely against non-state actors.[186] Indeed, there may be good reasons for hesitation in this respect. Embracing corporate power and influence officially to procure an alternative outcome is obviously controversial when applied against a state actor. Companies lack the legitimacy of state actors, whether those state actors are democratically elected representatives or otherwise recognized agents meant to be representing a population rather than a narrow class of shareholders. Moreover, companies themselves recognized their own limitations in the area of quasi-governmental activities when they pushed back strongly against an earlier articulation of business and human rights in the Draft U.N. Transnational Norms; wherein the Norms would have made companies responsible for human rights outcomes in areas within the

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184. *See, e.g.*, Comm'n on Hum. Rts., Interim Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 16, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) (noting the emergence of the "transnational corporate sector" and that "[o]ther social actors increasingly are looking for ways to leverage this platform in order to cope with pressing societal problems—often because Governments are unable or unwilling to perform their functions adequately").

185. Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, ¶ 13, U.N. Doc. A/HRC/8/16 (May 15, 2008) (observing that "companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage . . . . Nor is it desirable to require companies to act wherever they have influence, particularly over Governments").

186. *Id.*; *see also* Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. Rev. 1359, 1365 (2021).

companie's 'sphere of influence.'[187] As such, leverage, as used by Ruggie and now as it appears in the U.N. Guiding Principles, does not require that a company be responsible for ensuring a particular outcome. Instead, it requires that companies be conscious and intentional about the effects of their business decisions and that they use the choices available to them not to worsen or otherwise contribute to human rights abuses. In this limited way, we may think about the choices available to companies with respect to ordering their tax affairs in a manner that takes human rights into account by not contributing to state actors that carry out human rights abuses.

It has also become increasingly popular for activists, policy groups, and some academics to characterize the human rights impacts of corporate tax planning as choices that *deprive* states of revenue necessary to secure socio-economic rights guarantees.[188] Under this logic, companies that seek to minimize their tax bill are withholding key resources that states need to ensure the health, housing, education, and other social services for their citizens.

Ensuring that companies do not unduly deprive states of tax revenue has the potential to lessen the cat and mouse game between companies and states when it comes to tax. In an oppositional way of thinking, companies win by escaping tax and thereby increase their profits in a manner that is beneficial to shareholders but detrimental to the broader society. Of course, the easy reply is that companies owe a fiduciary duty to their shareholders to increase the company's value and protect it from dilution. But CSR that informs company decision-making seeks to ensure that companies consider the impacts of those decisions on the broader society. Decisions undertaken in this way may be driven by an internalized sense of obligation but may also be motivated by their potential to increase long-term corporate value in terms of reputational gains and social good will.[189]

Characterizing corporate decision-making and its human rights impacts in this way does, however, encounter several challenges that

187. *See* Kishanthi Parella, *Compliance as an Exchange of Legitimacy for Influence*, *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 769, 777–79 (Paul Schiff Berman ed., 2020).

188. *See, e.g.*, Olivier De Schutter, *Taxing for the Realization of Economic, Social, and Cultural Rights*, *in* TAX, INEQUALITY, AND HUMAN RIGHTS 59 (Philip G. Alston & Nikki R. Reisch eds., 2019).

189. Butler, *Corporate Commitment to International Law*, *supra* note 93, at 473–87.

ought to be acknowledged. First, as was discussed above, the global minimum tax should, if implemented properly, reduce the ability of companies to escape tax liability entirely. This then would render the concern about depriving any state of tax revenue moot, because the company will be forced to pay tax somewhere.

Second, the choice of paying tax inevitably deprives one state or another of that tax revenue because of the international norm against double taxation. That norm against double taxation has been a guiding principle of the international tax law framework since the 1920s and even reformers engaged in the current overhaul of the international tax system have not attempted to argue that companies should be subjected to double or increased multiples of taxation on the same sourced income.[190]

Third, there is no guarantee that, even if a company did pay 'full' tax, that the government of the state to whom the revenue was paid would, in fact, use it to advance socio-economic rights outcomes for its citizens. One might argue that companies could evaluate the budget and spending of such countries to see if they are compatible with proper deployment of resources toward appropriate ends. This would be a kind of reverse of the governmental oversight of charitable agencies, under which charities are deemed effective if they spend less than a certain proportion of the donations that they receive on salaries. But we may have very real hesitation with respect to this corporate involvement in the direct evaluation of government spending in this way. States make different choices about how to spend their money and these choices are often the result of a democratically informed process of deliberation. Allowing companies to rate and choose to which states they pay tax based on their own private evaluation of these budgetary choices is bound to raise important objections.

This Subsection has thus examined two ways that human rights may inform corporate choices with respect to tax planning. First, that companies should not contribute via tax to states with a poor human rights record if they can avoid it. Second, companies should not deprive states of funds through aggressive tax avoidance that states need to secure socio-economic rights for their populations. Though the second has been the focus of many activists, the first is actually more realistic in terms of ease of implementation and evaluation for executives. The first prong (not contributing to human rights abuses) also aligns better with and fits more seamlessly within the existing and emerging framework of business

190. *See* Graetz & O'Hear, *supra* note 50, at 1066.

and human rights in international law more generally. It might be wise for activists, therefore, to refocus their efforts on the first prong so as to ensure broader buy-in from companies than on the second.

2. Development

An important objection to the global minimum tax proposal is that its quest to remove tax competition between states will also reduce incentives for companies to choose to be based in developing countries.[191] Many developing countries offer tax incentives to attract companies as a crucial component of their overall economic development strategies.[192] Erasing their ability to offer such incentives will, it is argued, also make it more likely that companies will remain based in (and paying tax in) developed countries.

As the right to development becomes established in international law via the Draft Convention highlighted earlier and as companies consider international law in making CSR oriented decisions also in the sphere of tax planning, the right to development could work to provide both a narrative justification as well as a legally informed reason to motivate companies to pay tax to developing countries rather than developed countries where such a choice is practically available. The argument is not that the right to development makes it mandatory or required in some way for major companies to be located in developing countries. Instead, it is that companies may potentially deploy the rationale of advancing development as a way to legitimate their tax choices.

Such debates make clearer the stakes of international tax for global economic development. Companies may argue that they have little say in the institutional mechanisms for financing economic development through international institutions. However, their own tax choices are exceedingly meaningful with respect to international development. Indeed, developing countries are particularly reliant on corporate income tax as it constitutes a much larger share of their overall tax revenue than such tax does for developed countries.[193]

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191. Tsilly Dagan, *GLoBE: The Potential Costs of Cooperation*, 51 INTERTAX 638, 638 (2023) (observing, with respect to the 2021 two-pillar tax deal that "[o]ne key potential cost for developing countries is their reduced (though not fully eliminated) ability to pursue competitive tax strategies").

192. Titus, *supra note* 32, at 424–25.

193. *See* Mohammed Mardan & Michael Stimmelmayr, *Tax Competition Between Developed, Emerging, and Developing Countries—Same but Different?*, 146 J. DEV. ECON.,

Moreover, in the sphere of financing for infrastructure and industrial projects that promote economic development, financial entities have already pledged to incorporate various CSR-based norms in their decision-making through the Equator Principles.[194] The Equator Principles "are intended to serve as a common baseline and framework for financial institutions to identify, assess and manage environmental and social risks when financing projects."[195] And, through these principles, the financial institutions that have chosen to subscribe to them have pledged that they "will not provide Project Finance, Project-Related Corporate Loans to Projects or Project-Related Refinance and Project-Related Acquisition Finance to Projects which do not comply with the relevant Equator Principles requirements."[196] As such, lenders have promised to order their discretion in financing development not only according to legal compliance or profit calculations, but also in line with environmental protection and social impact. The inclusion of development concerns in this Article's analysis, similarly, builds on this broader corporate commitment to explore CSR-based decision-making also with respect to tax planning. Indeed, while the Draft Development Convention contemplates a role for companies as important actors for assisting states to secure economic development, the Draft Development Convention has yet to connect the dots with respect to guiding companies' tax choices.

It may also be appropriate for companies considering the development rationale in their tax planning decisions to consider the likelihood that the money paid will actually go toward development. Anti-corruption and the administrative capacity to run a country's tax system are weighty considerations in this regard. Corruption can result in the syphoning of tax payments away from initiatives that will aid development, and a lack of capacity with respect to tax collection may also impede the effective administration of a country's tax system. The Draft Development

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Sept. 2020, at 1 (observing that "developing countries are more reliant on the corporate income tax as a source of revenue").

194. *See* Equator Principles, Equator Principles (2020), https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf [https://perma.cc/2NWQ-3Q2P]. *See generally* Butler, *The Corporate Keepers of International Law*, *supra* note 24, at 209–10.

195. Equator Principles, *supra* note 194, at 3.

196. *Id.* at 3–4.

Convention castigates corruption as an impediment to economic development.[197] And, the resolution initiating drafting of a U.N. Tax Convention specifies the lack of state capacity as an urgent problem for international tax reform.[198] As such, taking corruption and capacity into account may offer additional clarity to companies seeking to align CSR and tax with respect to the imperative of contributing positively to development.

3. *Environment*

Government officials have long recognized that tax may prove an effective mechanism for propelling corporations to take action and pursue innovation that improves the global environment.[199] From carbon tax schemes to incentives for utilizing green technology, states regularly seek to cajole business to adopt more environmentally friendly practices.[200] By embracing that mechanism in reverse, we may think more deeply about how business choices of where to pay tax may be inflected with environmentally-conscious thinking.

'Environment' currently forms the first prong of socially conscious, or the 'E' of ESG business practices and investing.[201] This 'E' category is broad and may include a range of activities aligned with and having an impact upon the global environment. Businesses regularly evaluate their own conduct based on environmental factors, and they are subjected to rankings which prominently feature environmental factors.[202] As such, corporations are used to assessing their own conduct and the conduct of

197. Human Rights Council, *supra* note 103, art. 18 ("States Parties recognize that corruption represents a serious obstacle to the realization of the right to development.").

198. G.A. Res. 78/230, at 2, 4 (Dec. 28, 2023) ("Recognizing further that inclusiveness in international tax cooperation also involves capacity-building and support to developing countries . . . while stressing that capacity-building efforts should fully take into account the needs and priorities of developing countries. . . . Recommitting to strengthening the capacities of revenue administrations.").

199. IMF, *Fiscal Policies for Paris Climate Strategies—from Principle to Practice*, IMF Policy Paper (May 2019), at 14–15, https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/05/01/Fiscal-Policies-for-Paris-Climate-Strategies-from-Principle-to-Practice-46826 [https://perma.cc/6QJ9-PWVA].

200. *Id.* at 69–73.

201. *See* Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 404, 420–21 (2024).

202. *See* Madison Condon, *'Green' Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 5–6 (2d ed. 2023).

partners with respect to their environmental practices.[203] And, there are rankings available that assess the conduct of businesses for investors and activists.[204]

The influence of environmental factors with respect to corporate tax planning might operate in two ways.

First, just as companies should not contract with business partners with a poor environmental track record, we might urge companies to structure their affairs so that they pay tax in jurisdictions that have a good environmental record and not in those that do not. We may be concerned that such a practice will unduly benefit developed countries, particularly those that have shifted to a predominantly service-based economy because they no longer need to participate in manufacturing, resource extraction or other industries with significant environmental impacts. Such is the objection usually raised by developing states with respect to recent efforts to ensure climate regulation and international attempts to restrict environmentally harmful activities.[205] But this need

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203. *See* Aguirre, *supra* note 150, at 2081 (observing that "a company may use data it already collects to improve the environmental or social impact of its products").

204. *See* Jason Halper et al., *ESG Ratings: A Call for Greater Transparency and Precision*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 10, 2022), https://corpgov.law.harvard.edu/2022/11/10/esg-ratings-a-call-for-greater-transparency-and-precision/ [https://perma.cc/WKV4-7XGM] (observing that "ESG ratings are likely to remain in the spotlight given their importance for investors, issuers and policymakers"); Betty Moy Huber & Michael Comstock, *ESG Reports and Ratings: What They Are, Why They Matter*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 27, 2017), https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/ [https://perma.cc/6CZN-E4NL].

205. *See* United Nations Framework Convention on Climate Change art. 3(2), May 9, 1992, 1771 U.N.T.S. 107 (declaring that "[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration"); *see also* Lauren Sommer, *Developing Nations Say They're Owed for Climate Damage. Richer Nations Aren't Budging*, NPR (Nov. 11, 2021), https://www.npr.org/2021/11/11/1054809644/climate-change-cop26-loss-and-damage [https://perma.cc/LCD5-MHEE]; Eur. Parliament Comm. on Env't, Pub. Health and Food Safety, Climate Change Impacts on Developing Countries—EU Accountability, IP/A/ENVI/ST/2007-04 (Nov. 2007), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/393511/IPOL-ENVI_ET(2007)393511_EN.pdf [https://perma.cc/57WB-2BUS] (asserting that "[d]eveloping countries are much more vulnerable to climate change than the developing world"); David Gelles, *Narendra Modi, India's Leader, Rebukes Developed Countries: 'A Small Section of Humanity Has Indiscriminately Exploited Nature*, N.Y. TIMES (Dec. 1, 2023),

not be the certain outcome of such evaluative efforts from companies. Indeed, the question is about taking the environment into account. If companies see movement from states with respect to new commitments or measures in support of the environment, this may be a basis for companies to articulate and justify different environmentally informed tax choices. Moreover, the second factor to be articulated may offer a useful counterbalance to the first articulated here.

Second, certain states are specifically impacted by climate change. These are predominantly developing states.[206] And it has been objected regularly at climate change summits that developed states have not met their financial commitments to fund climate mitigation measures.[207] Small island states in particular as well as other categories of developing states are especially vulnerable and impacted by climate change that has been fueled by poor environmental practices.[208] Thus, it may be right for companies to take these factors into account in terms of structuring their tax choices.

Indeed, in a recent advisory opinion regarding maritime pollution, the International Tribunal for the Law of the Sea ("the Tribunal") declared that "scientific, technical, educational and other assistance to developing States that are particularly vulnerable to the adverse effects of climate change is a means of addressing an inequitable situation."[209] This inequity, the Tribunal observes, means that "[a]lthough they contribute

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https://www.nytimes.com/2023/12/01/climate/narendra-modi-india-cop28.html [https://perma.cc/F62W-Z75P].

206. Ruma Bhargawa & Megha Bhargava, *The Climate Crisis Disproporionatley Hits the Poor. How Can We Protect Them?*, World Econ. F. (Jan. 13, 2023), https://www.weforum.org/agenda/2023/01/climate-crisis-poor-davos2023/#:~:text=The%20lowest%20income%20countries%20produce,and%20water%2C%20education%20and%20more [https://perma.cc/CM6R-8EDM] (noting that "[t]he lowest income countries produce one-tenth of emissions, but are the most heavily impacted by climate change").

207. *See, e.g.*, Mia Mottley, Prime Minister of Barbados, *Opening Remarks at COP26 World Leaders Summit* (Nov. 1, 2021), https://unfccc.int/sites/default/files/resource/BARBADOS_cop26cmp16cma3_HLS_EN.pdf [https://perma.cc/HTQ9-TVHN].

208. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS, ¶ 69 (May 21, 2024), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf [https://perma.cc/WZ32-Z3TB] (declaring that "[l]ow-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are identified as those particularly vulnerable to the adverse effects of climate change").

209. *Id.* ¶ 327.

less to anthropogenic GHG emissions, such states suffer more severely from their effects on the marine environment."[210] Accordingly, the Tribunal asserted recipients of international assistance to combat the effects of this maritime pollution "should be those developing and least developed States that are most directly and severely affected by the effects of such emissions on the maritime environment"[211] and that such assistance "may include financial assistance . . . ."[212] Though the Tribunal's opinion is addressed to states and their obligations with respect to rendering assistance to other states specially impacted by maritime pollution, companies may also contribute to such assistance through their environmentally-aligned tax planning choices.

I have previously articulated this sort of symbiotic relationship between companies and international law as a form of "extending" international law.[213] In this way, a company may "give effect to an international legal obligation that its home state has expressly rejected, failed to implement, or carried out inadequately."[214] Accordingly, though states have not fulfilled their climate-related obligations, the mechanism of environmentally-informed tax planning proposed in this Article may allow the international system to deputize companies to generate greater funding for environmental priorities and mitigation of the environmental impacts of climate change.

C. *Benefits and Balancing*

For just over a hundred years, international tax has been ordered according to the benefits principle.[215] This principle provides that active income—like income from sales and other forms of business activity—should be taxed where it is generated or at its source, and passive income—say, from investments—should be taxed where a person or entity is resident.[216] An explanation of this principle is that active income

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210. *Id.*

211. *Id.* ¶ 330.

212. *Id.* ¶ 336.

213. Butler, *The Corporate Keepers of International Law*, *supra* note 24, at 199.

214. *Id.* at 192.

215. Reuven S. Avi-Yonah, *Nothing New Under the Sun? The Historical Origins of the Benefits Principle*, 51 INTERTAX 547, 547–48 (2023).

216. Reuven S. Avi-Yonah, *Tax Arbitrage and the International Tax Regime*, *in* TAX ARBITRAGE AND THE CHANGING STRUCTURE OF INTERNATIONAL TAX IX, XIII (Luca Dell'anese ed., 2006) (noting that "[t]he Benefits Principle states that the residence

is more likely to have been reliant on critical infrastructure and other forms of state support where the income or activity occurs.[217] As such, there is an implicit reciprocity through which the person or business entity taxed gives back to the state a portion of the benefit the state has bestowed upon it.

The benefits principle is already woven into existing international legal arrangements, and it is one that underpins the legal obligations according to which companies plan their tax affairs.[218] It may be that we wish companies to order whatever discretion regarding where they pay tax that is not erased by domestic legislation and international treaty solely according to the relative contribution of each jurisdiction to the business's success.[219] A similar understanding of reciprocity is also at the heart of some justifications of CSR.[220] Indeed, according to such accounts of CSR, businesses should recognize and reward the various societal stakeholders within and outside the company that have contributed to the profit that the business has generated.[221]

Ordering corporate tax discretion regarding the *where* question might simply call for companies to make distributional decisions based on the relative contribution of benefit received from each jurisdiction. Making these decisions may be difficult and will also call for further decisions about how to value inputs in complicated, multijurisdictional business processes. But let us assume that it is possible.

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jurisdiction has the primary right to tax passive (investment) income, while the source jurisdiction has the right to tax active (business) income").

217. Mason, *The Transformation of International Tax*, *supra* note 32, at 390.

218. Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185, 188–89 (2016) (noting that the benefits principle "is embedded in over 3000 bilateral tax treaties as well as the domestic laws of the United States and most other countries").

219. Mason, *The Transformation of International Tax*, *supra* note 32, at 390 (conceding that "[a]lthough the benefits principle would largely reject allocation of tax entitlement to states where companies have no productive factors, it generates no clear guidelines regarding what proportions of income *should* be allocated to states with real factors of production (however generously defined)").

220. *See, e.g.*, Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 882–87 (2022).

221. *See, e.g.*, Lucian A. Bebchuk et al., *Does Enlightened Shareholder Value Add Value?*, 77 BUS. L. 731, 735 (2022) (observing that, according to the 'enlightened shareholder value' approach, "[c]orporations and their long-term success inevitably depend on the cooperation and contributions of stakeholders").

Arguing that corporate tax discretion should simply be applied in extension of the benefits principle is a tenable position. On this account of making distributional decisions solely on the benefits principle, corporations would be acting merely as a sort of extension of the respective governments in which they operate. Distributing tax in such a way would merely be a kind of extrapolation of what the different governments would have wanted had they legislated with sufficient foresight or precision to close such a gap or loophole. As such, this may be a means of ensuring that companies enact not only the letter but the 'spirit' of tax law in a manner called for by the OECD's Guidelines on Multinational Corporations discussed above.[222]

Yet, this is very much like calling for companies only to perform minimum compliance. Increasingly, however, CSR has called on companies to do more—to act as agents of the international system or keepers of international law.[223] In this regard, companies have been called to act as enforcers of various norms of international law in their business decision-making with respect to where to do business, where not to do business, and how to conduct such operations.[224] Indeed, as the Draft Business and Human Rights Treaty emphasizes, "business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect internationally recognized human rights . . . ."[225] Bare compliance with the rules of whatever jurisdiction in these situations is insufficient and so this Article has contemplated what it may look like for CSR to instruct corporations to deploy their tax discretion beyond minimum compliance.

This Part has so far articulated certain additional decision-making factors companies that have sought to affirm their commitment to a CSR-inflected approach to taxation may wish to incorporate into their tax planning so as to give substance to these promises. These factors are not intended to displace the benefits principle, but rather to supplement it.

222. Org. for Econ. Coop. and Dev. [OECD], *supra* note 146, at 51.

223. *See generally* Butler, *The Corporate Keepers of International Law*, *supra* note 24, at 189.

224. *See generally* Parella, *International Law in the Boardroom*, *supra* note 35.

225. Open-Ended Intergovernmental Working Group [OEIGWG], Legally Binding Instrument to Regulation, in International Human Rights Law, the Activities of Transnational Corporations and Business Enterprises, ¶ 11, (Aug. 17, 2021) (third revised draft), https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf [https://perma.cc/SGC7-HST2].

In terms of applying the foregoing analysis in practice, two recommendations may be made. First, when faced with clear choices that implicate their tax discretion, companies should not ignore what discretion does exist or proceed in a manner that is oblivious to the social consequences of their decisions. Instead, if faced with structuring their affairs to pay tax in human rights-promoting country A versus human rights-violator country B, they should choose state A. And the analysis may carry on similarly for the other factors listed.

These choices will not always be so clear or presented so starkly. And the factors may cut in different directions. For example, one may ask which option a company ought to choose if country A is a developing country with a poor human rights record, but the other choice for tax payment has a better human rights record but is a developed state. But this is where we may consider a second recommendation as an important addition.

Companies that have pledged a CSR-aligned approach to international tax should also be expected to engage in public reasoning regarding the application of these pledges to their practical tax choices.[226] This public reasoning process might require companies to explain how they have balanced the CSR factors discussed above and then made their choices with respect to tax payments. Requiring this sort of transparency may work both to focus decision-making on justifications for the decisions made and to reduce the space for manipulation if the decision factors have to be disclosed and defended. In addition, the external scrutiny accompanying this sort of public reasoning might increase pressure on companies not to engage in tax manipulation and to maintain a degree of year-on-year consistency in fulfilling their past pledges.

IV. Corporate Distribution and the Limits of CSR

Corporate income tax is a scarce resource. States compete with each other to attract it. And, because states have long agreed that they will not tax corporate income twice, once one state captures that scarce resource another state cannot.[227] Consequently, the existence of corporate discretion

226. Jay Butler, *Amnesty for Even the Worst Offenders*, 95 Wash. U. L. Rev. 589, 632 (2017) (observing the value of public reasoning when decisionmakers are faced with conflicting considerations in international law). *See generally* John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 766–67, 776 (1997).

227. Graetz & O'Hear, *supra* note 50, at 1048.

with respect to where tax is paid also means that companies have choices regarding the distribution of this resource among and between states. States have implemented various coordinated initiatives to reduce companies' latitude over these choices and to disincentivize tax arbitrage, but corporate discretion persists.[228]

Rather than deny the existence of that discretion, this Article has so far examined how CSR norms may influence companies' distributional choices. That is not to say that CSR norms will or should be the only factor in making such decisions. Instead, the Article has explored what it may look like if we take seriously the possibility that CSR may act as *an* influence over these decisions regarding tax allocation. In so doing, it seeks to give substance to the various statements from companies appearing to embrace a more socially responsible approach to taxation with which the Article began.

This Part turns to critique. It uses another recent example of corporate control over distribution of a scarce resource—newly developed COVID vaccines—to highlight the limits of CSR in guiding tax choices. While seeking an effective vaccine, pharmaceutical executives promised that distribution of an eventual vaccine would be equitable; that is to say, that vaccines would be distributed globally not just according to a state's ability to pay, but according to its need.[229] Yet, the reality of that global vaccine distribution was something very different. Developed states initially received a disproportionate share of the COVID vaccines available.[230] And a similar dynamic is beginning to play out in the arena of international tax.

This Part also highlights corporate lobbying for lower taxes overall to question the real value of company statements and other indicia of a more pro-social approach to taxation among business executives. The Article has, so far, sought to give substance to the declared intention of certain companies to incorporate ESG or CSR into their tax planning decisions. But, if, at the same time, companies are seeking to lower their tax burden overall through procuring legislative changes, these statements might

228. *See supra* Part II.D

229. Butler, *Corporate Commitment to International Law*, *supra* note 93, at 434–37.

230. Moosa Tatar et al., *COVID-19 Vaccine Inequality: A Global Perspective*, J. GLOB. HEALTH, (Oct. 14, 2022) at 2 ("Our results show that not only has the distribution of COVID-19 vaccinations not improved, but the inequality of COVID-19 vaccinations was also more severe by December 7, 2021.").

well merely be understood as empty gestures intended to obscure the actuality of business attitudes to tax.

This Part also asserts that any appraisal of company behavior that appears to exceed the bare minimum of legal requirements should consider the ways that companies also seek to erode the substance and stringency of those same rules. Indeed, we ought not congratulate companies for doing more than the law requires if these same actors have also been responsible for lowering the bar or diluting the content of what the law requires. This is, of course, a lesson that may be applied to other areas of CSR beyond tax. However, as this Part will argue in conclusion, there may yet be value even in empty promises.

To begin, we focus on a company that sits at the convergence of these questions regarding corporate tax lobbying, equitable vaccine distribution, and overall critiques of corporate-controlled distribution. The case-study analysis to follow is intended to illustrate the concerns outlined and to give substance to reasons for hesitation.

Two and a half weeks after the World Health Organization declared COVID-19 a pandemic,[231] Johnson & Johnson amended its Code of Business Conduct, effective March 30, 2020, "to provide enhanced guidance on addressing the evolving business environment."[232] In the latest edition of that document, the company pledged that, "[w]e must be good citizens . . . and bear our fair share of taxes."[233] In an accompanying document outlining its policy with respect to tax planning, the company explained how it intended to distribute that 'fair share' globally. It noted that "[o]ur tax contribution in each country is based on our activities performed within the country."[234] The document explained that these activities "may include . . . research and development, manufacturing, sales, marketing and other business support functions."[235] Moreover, Johnson & Johnson

231. Tedros Adhanom Ghebreyesus, Director-General, WHO, Opening Remarks at Media Briefing on COVID-19 (Mar. 11, 2020) (WHO declares COVID a pandemic).
232. *Code of Business Conduct*, JOHNSON & JOHNSON, https://www.jnj.com/code-of-business-conduct [https://perma.cc/KYJ2-6TH3] (last visited Jan. 27, 2024).
233. *Code of Business Conduct*, JOHNSON & JOHNSON (Jan. 2, 2023) at 2, https://www.jnj.com/code-of-business-conduct/english [https://perma.cc/NMW2-GGTS].
234. *Tax Policy*, JOHNSON & JOHNSON (Feb. 2024) at 1, https://www.jnj.com/about-jnj/policies-and-positions/tax-policy [https://perma.cc/5ZCX-U69C].
235. *Id.*

itself categorized and listed its 'Tax Policy' as one of its 'ESG Policies & Positions.'[236]

As such, the company declared a global distributional commitment to be 'fair' that exceeded bare compliance with the legal requirements of jurisdictions regarding tax. Indeed, if it planned to order its tax affairs only according to the standard of minimum compliance it could, presumably, have said so. Instead, Johnson & Johnson pledged to do more with respect to tax.

Yet it is not clear how the company has or intends to realize that commitment in numerical terms.[237] Johnson & Johnson only discloses publicly its total tax paid worldwide, not its country-by-country reporting figures.[238] Even though Johnson & Johnson cites to GRI Standard 207 regarding tax, and particularly cites to GRI Disclosure 207-4 regarding country-by-country reporting, it does not provide this information to the general public. Instead, the company notes that "[o]ur intent is to provide a comprehensive view of total taxes paid around the world" and that "[w]e aspire to include all markets in future years."[239] Thus, though Johnson &

236. *ESG Policies & Positions*, JOHNSON & JOHNSON, https://www.jnj.com/about-jnj/policies-and-positions [https://perma.cc/JFT7-98HE] (last visited Jan. 27, 2024).

237. As to how much the company has paid year over year, it will be for others to undertake an analysis of the empirical data available. The total worldwide tax that the company pays may be impacted by a number of factors. Johnson & Johnson notes in its 2022 Annual Report that its worldwide effective tax rate increased to 17.4% in 2022 from 8.3% in 2021. But again, a number of factors may be at play and I would be hesitant to attribute this increase solely to their declared commitment to amalgamate tax and ESG. *2022 Annual Report*, JOHNSON & JOHNSON 1, 32 (Mar. 2023), https://www.investor.jnj.com/files/doc_financials/2022/ar/2022-annual-report.pdf [https://perma.cc/V9P4-B735].

238. *See* PWC, *Report of Independent Accountants*, (June 2, 2023), https://healthforhumanityreport.jnj.com/2023/_assets/downloads/2022_pwc-report-independent-accountants-managements-assertion.pdf?h=PNQFMfjs [https://perma.cc/L288-CZT8]; *2023 Health for Humanity Report*, JOHNSON & JOHNSON, https://healthforhumanityreport.jnj.com/2023/_assets/downloads/johnson-johnson-2023-health-for-humanity-report.pdf?h=Ka9OvM1t [https://perma.cc/A94H-C7NE] (last visited Nov. 11, 2024) (noting that "[o]ur intent is to provide a comprehensive view of total taxes paid around the world. Corporate Income Tax represents payments in all markets in which we operate and is the amount reported as Income Taxes Paid in the 2023 Annual Report. Other taxes shown aggregate our data from 40 major markets that represent the vast majority of our revenues. We aspire to include all markets in future years.").

239. *Tax Responsibility*, JOHNSON & JOHNSON, https://healthforhumanityreport.jnj.com/2023/accountability-innovation/corporate-governance/tax-responsibility.html#:~:text=In%202023%2C%20J%26J%20contributed%20approximately,and%20economies%20around%20the%20world.&text=This%20Total%20Tax%20

Johnson has disclosed its worldwide total tax paid, the country-by-country breakdown of its allocative choice remains opaque. As such, it is difficult to gain an accurate picture of its distributive decisions with respect to tax payments or what actually guides those choices in practice.

With regard to the distribution of COVID vaccines, Johnson & Johnson made similar pledges of global equity.[240] But, its actual performance yielded very different results.[241]

Johnson & Johnson announced that it had identified a vaccine candidate to reduce the severity of COVID toward the end of March 2020.[242] Its CEO, Alex Gorsky, promised then that the company would ensure that an eventual vaccine would be made "available and affordable as quickly as possible."[243] Gorsky announced that "we wanna make sure the patients certainly here in the United States but around the world can get access in a very affordable way" and "we're gonna make sure that we're offering this at a not-for-profit basis here in the United States and around the globe."[244] Gorsky proclaimed that "we are committed to doing our part to make a COVID-19 vaccine available and affordable globally as quickly as possible" and that "[a]s the world's largest healthcare company, we feel a deep responsibility to improve the health of people around the world every day."[245]

Other pharmaceutical companies racing to find a vaccine made similar commitments to ensure equitable distribution worldwide. The CEO of

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Contribution%20is,in%20taxes%20around%20the%20world. [https://perma.cc/7F5L-7849] (last visited Jan. 27, 2024).

240. *See infra* notes 242–43.

241. *See infra* notes 248–50.

242. *Johnson & Johnson Announces a Lead Vaccine Candidate for COVID-19; Landmark New Partnership with U.S. Department of Health & Human Services; and Commitment to Supply One Billion Vaccines Worldwide for Emergency Pandemic Use*, JOHNSON & JOHNSON (Mar. 30, 2020), https://www.jnj.com/media-center/press-releases/johnson-johnson-announces-a-lead-vaccine-candidate-for-covid-19-landmark-new-partnership-with-u-s-department-of-health-human-services-and-commitment-to-supply-one-billion-vaccines-worldwide-for-emergency-pandemic-use [https://perma.cc/3EXM-A5ZP] [hereinafter *Johnson & Johnson Announces a Lead Vaccine*].

243. Alex Gorsky, *Johnson & Johnson Announces It Has Identified a Lead COVID-19 Vaccine Candidate*, JOHNSON & JOHNSON (Mar. 30, 2020), https://www.jnj.com/latest-news/johnson-johnson-ceo-alex-gorsky-announces-coronavirus-vaccine-candidate [https://perma.cc/L3GL-SN5H].

244. TODAY (@TODAYshow), TWITTER (Mar. 30, 2020, 8:23 AM), https://twitter.com/TODAYshow/status/1244601204363137026 [https://perma.cc/4HM9-4RAR].

245. *Johnson & Johnson Announces a Lead Vaccine*, *supra* note 242.

Pfizer declared in May 2020 that "everybody will get a fair share of the supplies that exist as quickly as possible and . . . we will not forget about the underprivileged countries that likely commercially [ ] play very little role if any but from the human perspective they have equal rights."[246] And, AstraZeneca claimed in June 2020 that it had "taken the next steps in its commitment to broad and equitable global access" to the COVID-19 vaccine.[247]

Despite these pledges, however, by October 2021, the Secretary-General of the United Nations noted that "[v]accine nationalism and hoarding are putting us all at risk" and that "[t]hree quarters of all vaccines have gone to high- and upper-middle-income countries."[248] Contemporaneously, the Director-General of the World Health Organization observed in a joint letter with other U.N. officials that "[f]or every 100 people in high-income countries, 133 doses of COVID-19 vaccine have been administered, while in low-income countries, only 4 doses per 100 people have been administered."[249] In January 2022, the U.N. Secretary-General again called attention to the challenge of ensuring equitable access to vaccines by proclaiming before the General Assembly that

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246. Int'l Fed'n of Pharm. Mfrs. & Ass'ns, *Global Biopharma CEO/Top Executives COVID-19 Media Briefing,* YouTube (May 28, 2020), https://www.youtube.com/watch?v=0wMMwDshed0 [https://perma.cc/F89N-PT7K] (transcript on file with author); Butler, *Corporate Commitment to International Law*, *supra* note 93, at 435.

247. *AstraZeneca Takes Next Steps Towards Broad and Equitable Access to Oxford University's COVID-19 Vaccine*, AstraZeneca (June 4, 2020), https://www.astrazeneca.com/media-centre/press-releases/2020/astrazeneca-takes-next-steps-towards-broad-and-equitable-access-to-oxford-universitys-covid-19-vaccine.html# [https://perma.cc/S2PP-76QC].

248. U.N. Secretary-General, *Vaccine Nationalism, Hoarding Putting Us All at Risk, Secretary-General Tells World Health Summit, Warning COVID-19 Will Not Be Last Global Pandemic*, U.N. Doc. SG/SM/20986 (Oct. 24, 2021), https://press.un.org/en/2021/sgsm20986.doc.htm#:~:text=Vaccine%20Nationalism%2C%20Hoarding%20Putting%20Us,Last%20Global%20Pandemic%20%7C%20UN%20Press [https://perma.cc/W7NG-6L69]; *see also* Matiangai Sirleaf, *We Charge Vaccine Apartheid?*, 50 J.L., Med. & Ethics 726, 727 (2023) (observing that "[t]he euphemism of 'vaccine nationalism' papers over the racialized distributional consequences of vaccine inequities witnessed with COVID-19" and asserting that "countries in the Global South are currently being denied significant doses of COVID-19 vaccines").

249. *An Appeal to G20 Leaders to Make Vaccines Accessible to People on the Move*, WHO (Oct. 29, 2021), https://www.who.int/news/item/29-10-2021-an-appeal-to-g20-leaders-to-make-vaccines-accessible-to-people-on-the-move [https://perma.cc/7PMX-VSLT]; *see also* Sirleaf, *supra* note 248, at 727 (observing that "vaccine apartheid is a recent instantiation of longstanding global health inequities and injustice").

"[v]accination rates in high-income countries are seven times higher than in the countries of Africa" and that "the distribution is scandalously unequal."[250] Thus, COVID vaccine distribution appears to have been heavily weighted toward supplying wealthier countries in seeming direct contravention of earlier corporate promises to distribute vaccines based on need and considerations of global equity.

With regard to Johnson & Johnson in particular, the U.N. Working Group on the issue of human rights and transnational corporations wrote to the company's CEO to express "concerns about the unequal access to COVID-19 vaccines" which were "affecting negatively several human rights, particularly of individuals and people living in low- and middle-income countries, exacerbating inequality . . . ."[251] Echoing these concerns, a group of thirteen U.S. senators wrote to Johnson & Johnson in December 2021 to express their "grave concerns about Johnson & Johnson's commitment to providing vaccines for low-income and middle-income countries" and shared that they were "dismayed by Johnson & Johnson's continued prioritization of vaccine orders for high-income countries . . . ."[252] And, when Johnson & Johnson did finally expand its production capacity and set up vaccine manufacturing in South Africa, it did so only to export the vaccines eventually produced to Europe.[253]

To be clear, Johnson & Johnson eventually contributed significantly to international mechanisms to ensure adequate supply of COVID-19 vaccines to lower income countries. Concurrently, activist shareholders have offered proposals calling for greater transparency from the company regarding government funding and vaccine pricing.[254] Though the Board

250. U.N. Secretary-General, *Remarks to the General Assembly on His Priorities for 2022* (Jan. 21, 2022), https://www.un.org/sg/en/content/sg/statement/2022-01-21/secretary-generals-remarks-the-general-assembly-his-priorities-for-2022-bilingual-delivered-scroll-down-for-all-english-and-all-french [https://perma.cc/E27F-W2ZD].

251. Letter from Surya Deva et al. to Alex Gorsky, OL OTH 246/2021 (Oct. 14, 2021), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26728 [https://perma.cc/5VPC-93T4].

252. Letter from Sen. Sherrod Brown et al. to Alex Gorsky (Dec. 20, 2021), https://www.brown.senate.gov/imo/media/doc/brown_jj_vaccine_letter.pdf [https://perma.cc/CJ65-XTNT].

253. Rebecca Robbins & Benjamin Mueller, *Covid Vaccines Produced in Africa Are Being Exported to Europe*, N.Y. Times (Aug. 16, 2021), https://www.nytimes.com/2021/08/16/business/johnson-johnson-vaccine-africa-exported-europe.html [https://perma.cc/FVX4-PCX8].

254. Letter from Robert K. Silverman to Marc S. Gerber (Feb. 7, 2022), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/oxfamjohnson020722-14a8.pdf

of Directors declared their opposition to these resolutions, the Board affirmed in official Proxy Statements that "the Company committed to allocate up to 500 million vaccine doses to lower income countries"[255] and that "80% of all our vaccine doses [have been] shipped for use in low- and middle-income countries . . . ."[256]

Yet, we should note that these developments also came only after significant controversy regarding the efficacy and potential side-effects of the company's vaccine.[257] In wealthier states where individual patients and public health administrators had greater choices regarding vaccine preference, this unfortunate publicity began to influence perceptions of the Johnson & Johnson vaccine.[258] This is not to undermine or diminish the company's contribution to global public health, but the chronology of the manifestation of this commitment must also be borne in mind as we assess with caution the possibility that CSR might more openly influence company decision-making regarding the distribution of tax payments across different jurisdictions.

With respect to the distribution of COVID-19 vaccines worldwide, we must also consider the role of wealthy states in ensuring their own supply at the expense of low- and middle-income countries. In December 2021, the World Health Organization's Director of the Department of Immunization, Vaccines and Biologicals called attention to "high-income

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[https://perma.cc/DSN4-4J7R]; *Shareholder Resolutions Demand that Pfizer, Moderna, Merck, Johnson & Johnson Address Unequal Access to COVID-19 Vaccines and Medicines*, Oxfam (Nov. 10, 2022), https://www.oxfamamerica.org/press/press-releases/shareholder-resolutions-demand-that-pfizer-moderna-merck-johnson-johnson-address-unequal-access-to-covid-19-vaccines-and-medicines/ [https://perma.cc/7QZ2-THS7].

255. Johnson & Johnson, Proxy Statement (Form DEF 14A) (Mar. 10, 2021), at 1, 106.

256. Johnson & Johnson, 2023 Proxy Statement and Additional Definitive Proxy Solicitation Materials 1, 131 (2023), https://www.investor.jnj.com/files/doc_financials/2022/ar/2023-proxy-statement.pdf [https://perma.cc/5D29-FKPL].

257. *See, e.g.*, Press Release, Peter Marks, Director - Center for Biologics Evaluation and Research, U.S. Food And Drug Admin., Joint CDC and FDA Statement on Johnson & Johnson COVID-19 Vaccine (Apr. 13, 2021), https://www.fda.gov/news-events/press-announcements/joint-cdc-and-fda-statement-johnson-johnson-covid-19-vaccine [https://perma.cc/Y34X-L645] (regarding risk of blood clots associated with the Johnson & Johnson vaccine); Apoorva Mandavilli, *J.&J. Vaccine May Be Less Effective Against Delta, Study Suggests*, N.Y. Times (July 20, 2021), https://www.nytimes.com/2021/07/20/health/coronavirus-johnson-vaccine-delta.html [https://perma.cc/KK9Q-6Q35].

258. Edward Segal, *Johnson & Johnson Faces Yet Another Crisis Situation This Year*, Forbes (Dec. 21, 2021), https://www.forbes.com/sites/edwardsegal/2021/12/17/johnson--johnson-faces-yet-another-crisis-situation-this-year/ [https://perma.cc/6GPT-FRHV].

countries hoarding vaccines."[259] Indeed, it has subsequently been reported that the UK Prime Minister at the time even went so far as to consider invading another country to secure his own state's perceived share of the limited worldwide vaccine supply.[260]

This Article is not about COVID-19. However, we should consider how companies that are faced with pressure from rich states to secure a distribution of a scarce resource that advantages those rich states may undermine previous corporate commitments to equity and international equality. Tax provides another such potential example in terms of the distributive choices that companies face and the increasing pressures exerted by wealthy states. With respect to COVID-19, the distribution of vaccines was made publicly available. Yet, with tax, wealthy states have sought themselves to thwart any kind of open scrutiny or tax transparency. For instance, it has been reported that the OECD actively lobbied the Australian government not to enact legislation that would force multinational corporations operating in Australia to publicly reveal their country-by-country tax payments.[261]

Companies are not blameless, of course. We must also acknowledge the symbiosis of pharmaceutical companies and the developed states in which they are incorporated. Developed states were eager to ensure their own access to COVID-19 vaccines as a matter of priority and were willing to pay whatever price tag was set. As such, the U.N. Secretary-General pointed out in February 2021 that, thus far, "[j]ust ten countries have administered 75 per cent of all COVID-19 vaccines" and "more than 130 countries have not received a single dose."[262] Moreover, pharmaceutical companies and developed states went to great lengths to block

259. *Vaccine Hoarding Will Prolong COVID Warns WHO, as Agency Mulls Early Omicron Data*, U.N. News (Dec. 9, 2021), https://news.un.org/en/story/2021/12/1107542 [https://perma.cc/HCB8-VJYD].

260. Aubrey Allegretti, *Boris Johnson Plotted Military Raid on Dutch Covid Plant*, The Sunday Times (Dec. 4, 2023), https://www.thetimes.co.uk/article/boris-johnson-raid-dutch-covid-vaccine-plant-l0l75q0z7 [https://perma.cc/RGS6-VPX9].

261. *OECD Pressed Australia to Drop Plan to Reveal Where Multinationals Pay Tax*, Fin. Times (July 7, 2023), https://www.ft.com/content/b21cfde0-8940-45db-b3e3-3e9807d7b957 [https://perma.cc/2A8J-25MM].

262. U.N. Secretary-General, *Remarks to the Security Council Open Meeting on Ensuring Equitable Access to COVID-19 Vaccines in Contexts Affected by Conflict and Insecurity* (Feb. 17, 2021), https://www.un.org/sg/en/content/sg/statement/2021-02-17/secretary-generals-remarks-the-security-council-open-meeting-ensuring-equitable-access-covid-19-vaccines-contexts-affected-conflict-and-insecurity-delivered [https://perma.cc/FY8F-EQRD].

strategies that may have afforded greater access for lower income countries in the early stages of vaccine manufacture and distribution by insisting upon stringent intellectual property protections for vaccine formulae.[263] Such actions kept prices high, benefiting pharmaceutical companies tremendously.

Against this backdrop, it is appropriate to question the value and effectiveness of CSR generally and specifically in so far as it interacts with international tax. If CSR is to achieve any substantive impact on corporate tax choices, we must also grapple with how rich states eager to hold on to tax revenues place their thumb on the scale and pressure corporations to make different choices. Indeed, the desire of developed states to capture corporate tax revenue may entrench global economic inequality in a manner similar to the ways that COVID-19 vaccine hoarding by developed states compounded global public health inequity.

This Article has so far asserted that corporations may make distributional choices about where they pay tax that are guided by core principles of CSR. The easy critique of this proposal is that companies will always make choices that allow them to pay as little tax as possible. But the ascendance of CSR in other areas of business practice—through which businesses make choices that are not always the cheapest but satisfy internalized norms of pro-social behavior—combined with the external sanction of investor rankings that will soon be brought to bear make this critique overly simplistic.

A deeper and more troubling critique, however, is the tension between CSR and the hoarding instincts of rich states. As the discussion in Part II, the OECD promulgated Pillar One of BEPS 2.0 to respond to widespread concern that companies were extracting value from jurisdictions without paying tax in return. In that respect, France was one of the countries particularly aggrieved. It argued that Facebook and other tech giants had

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263. *Countries Obstructing COVID-19 Patent Waiver Must Allow Negotiations to Start*, MEDECINS SANS FRONTIERS (Mar. 9, 2021), https://www.msf.org/countries-obstructing-covid-19-patent-waiver-must-allow-negotiations [https://perma.cc/8K6G-PLPA]; Sirleaf, *supra* note 248, at 729 (asserting that "[d]uring the pandemic, [pharmaceutical companies] were able to exercise their monopoly power to artificially limit supply, by preventing others from accessing the technologies needed to create the vaccines," and that "[m]any of these pharmaceutical companies primarily based in the Global North have amassed substantial amounts due to the monopoly rights provided by the intellectual property regime").

millions of customers (and benefited from associated advertising sales) based in France, without paying any tax because it avoided a physical presence there.[264]

Yet, as our earlier discussion also illustrated, pinning down who should benefit through the receipt of associated tax payments from these business activities—particularly when conducted via a complex, multi-step, global supply chain—can be difficult. If a company like Johnson & Johnson has sourced key ingredients for its pharmaceuticals or run drug trials in developing countries and manufactured such drugs in factories in middle-income countries but makes the final sale of its products to consumers in a developed country, the distribution of tax (if based solely on the place where the value of the product is realized) is likely to inure to the benefit of developed countries. However, if Johnson & Johnson defines its 'activities' that have contributed to the product's realization to include all steps along the way, a different and slightly more equitable distributional outcome is possible. Moreover, if Johnson & Johnson were to consider development as a CSR value in restructuring where it pays tax, that might lead to a third distributional choice that is even more advantageous to developing countries, potentially at the expense of tax revenue the company might otherwise be willing to pay in developed countries.

Further, though Pillar Two of BEPS 2.0 might yield an answer for Johnson & Johnson about 'how much' its fair share ought to be (fifteen percent at a minimum), it does not provide an answer for *where* that amount should be paid. I have already argued above that the 'where' answer should be influenced by CSR values like human rights, development, and concern for the environment. But these values may not be sufficient to ensure that companies are guided toward an equitable outcome for the global distribution of tax revenues.

When it comes to sharing out global tax revenues, the world now faces a distributional challenge. Indeed, in her incisive article noting the recent "transformation" of the international tax landscape, Ruth Mason observes that "[t]he international tax regime has always represented a negotiated bargain among states over how to divide the spoils of globalization."[265] Mason further notes that "although we lack shared values that could

264. Mason, *The Fine Print*, *supra* note 124, at 4.
265. Mason, *The Transformation of International Tax*, *supra* note 32, at 402.

guide us to a stable new distributive outcome, we never shared such values."[266]

As the COVID-19 vaccines example highlights, CSR promises are fragile in the face of countervailing pressure and potential profit offered by wealthy states. That pressure is again observable with respect to the distribution of international tax revenues. Developing states are particularly reliant on corporate income tax as a share of their budgeted expenditures. But it is developed states that have led the charge to capture corporate income tax for themselves.

Wealthy countries remain eager to capture global corporate tax revenue.[267] Though the fifteen percent minimum tax rate to be introduced in Pillar Two has been characterized as an initiative that "levels the playing field,"[268] it instead effectively seeks to remove or greatly reduce the financial impetus for companies to shift operations to developing countries that offer tax incentives to attract such investment as a means to build economic activity and development.[269] Moreover, the 'top-up' mechanism through which wealthy states can collect a tax that is equivalent to the difference between the tax-rate offered as an incentive by a developing country and Pillar Two's fifteen percent tax floor is similarly problematic. As Steven Dean has observed, "[a]lthough the wealthier state can have no claim to the poor state's revenues under the benefit principle implicit in most international tax rules, the minimum tax nevertheless seizes it."[270]

In such an environment, the question then becomes whether the countervailing imperative of CSR in the context of tax is sufficient to guide corporate tax choices toward more equitable distributional outcomes. The example of the distribution of COVID-19 vaccines, however, gives reason for hesitation in this respect.

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266. *Id.*

267. This is a longstanding challenge. *See, e.g.*, Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. Int'l L. & Pol. 939, 989 (2000) (explaining that "in tax treaties with developed countries, the developing country will typically play the role of a host country, while the developed country will predominantly be the resident country" such that "when a treaty reduces the taxes that the host country can collect, it necessarily reduces tax revenues available for the developing country").

268. Janet L. Yellen, U.S. Sec'y of the Treasury, Remarks at the Brussels Economic Forum (May 17, 2022).

269. Titus, *supra* note 32, at 415.

270. Steven A. Dean, *Beyond the 'Made in America Tax Plan': GILTI and International Tax Cooperation's Next Golden Age*, 18 Pitt. Tax Rev. 341, 353 (2021).

Companies and countries are not hermetically sealed off one from another. Companies regularly lobby governments for preferential treatment and more lax regulations.[271] However, such lobbying actions by companies and even the perceived hypocrisy underlying it do not entirely invalidate the potential value of the commitments offered.

First, to be able to label a company's conduct or its lobbying contrary to a commitment as hypocrisy, there must first be an express commitment to contradict. That commitment provides the measure against which to critique the company's performance. This critique may be undertaken externally by activists or by rankings like those discussed above that measure corporate actions in line with this commitment. When investors pay attention to those rankings and care about company compliance, this can in turn provide a valuable measure of pressure for decisionmakers inside the company.

It may be argued that corporate tax commitments of the sort examined at the beginning of this Article are mere distractions that moot the urgency for legal reform. Perhaps it is not pure coincidence that these various pledges have been proclaimed just as the OECD proposal for a global minimum tax is picking up steam. As with 'greenwashing' through ambitious company statements regarding environmental protection that turn out to have little actual value in terms of changing the environmental impact of actual business operations, it may be that these tax pledges are intended to obscure the reality of corporate tax avoidance and the harmful social consequences of their complicated tax minimization schemes.[272]

All of this can be true, yet these commitments will still have value if we think about complex law building projects in ways offered by international law. International law often begins with soft law, particularly with respect to a new field like environmental regulation. International tax may be understood as a new field in so far as it seeks to construct a global shared understanding of substantive tax norms rather than merely coordinating mutual non-interference via the schema bilateral treaties

271. *See* Durkee, *supra* note 48, at 1742.

272. Barbara Ballan & Jason J. Czarnezki, *Disclosure, Greenwashing, and the Future of ESG Litigation*, 81 WASH. & LEE L. REV. 545, 550 (2024) ("Greenwashing occurs when a company concurrently engages in both negative environmental practices and positive communication about their environmental performance.").

that prevailed previously.[273] Indeed, soft law is often a means for states to subscribe to commitments that otherwise would not be possible if they were made binding and fully enforceable.[274] A recent study indicates that powerful states, like the United States, increasingly prefer non-binding agreements.[275] This does not fully invalidate the potential of such commitments for orienting state action around a particular end, but instead may be an acknowledgment that non-binding commitments can be an effective way to transform disagreement into compromise rather than generating inaction by pursuing formal agreements.

Similarly, with respect to CSR commitments regarding tax, it is possible that these non-binding promises will not be honored consistently in the stringent way that activists would prefer. Yet, they provide a building block toward greater and more rigorous realization of the norms regarding tax that underpin such pledges.

I have argued previously that, for international law to communicate its preferred outcomes effectively to companies (and overcome contrary preferences of states when present), international law must be clear with its instructions to these private entities.[276] Consequently, Part II highlighted some of the ongoing international legal projects, such as the Draft Business and Human Rights Treaty and the Draft Convention on the Right to Development, so as to mark these open opportunities for that sort of clear communication. Indeed, if international institutions wish for companies to decide on where to pay tax in a manner that is inflected and informed by international law (in so far as such rules are incorporated and reflected in the CSR values of human rights, development and the environment) then international law should be clearer in recognizing the

273. U.N. Secretary-General, *supra* note 55, ¶ 3 (observing that "[o]ver the past century, international tax cooperation has principally focused on mitigating the possible negative effects that countries' individual tax policy choices might otherwise have on productive cross-border trade and investment. The main approach has been to modify the operation of domestic tax rules otherwise applicable to cross-border income flows through bilateral tax treaties (for the purposes of that treaty relationship). These treaties seek to mesh the tax systems of the contracting States to prevent the double taxation of income and capital, without inadvertently leaving income and capital untaxed.").

274. *See generally* Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171 (2010).

275. *See* Curtis A. Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. Chi. L. Rev. 1281, 1284, 1288 (2023).

276. Butler, *Corporate Commitment to International Law*, *supra* note 93, at 495–98.

potential role and capacity of companies to act as keepers of international law in the sphere of international tax.

Conclusion

CSR and tax have a lot to talk about. Each field approaches business discretion very differently, with CSR treating it with mild optimism and tax treating it with disdain. It is in the challenge of best guiding the exercise of this discretion that the two fields might find commonality. For this conversation to prosper, however, this Article has sought to reorient the locus of interchange.

Up until now, attempts to bring the two fields together have focused on the 'how much' question. How much tax should companies pay, particularly how much in excess of what they can get away with not paying? This, I have argued, is not a fruitful point of exchange. It highlights a mismatch between the two fields with respect to their differing approaches to discretion. And international tax dealings led by the OECD and G20 might soon provide the beginnings of an answer through the Global Minimum Tax.

Instead, a better place to begin dialogue is around the question of where companies should pay tax. This is a question over which sophisticated tax planning still allows companies a significant degree of choice. And, just as CSR seeks to order business discretion about how and where to do business, it can also potentially offer insights about where to pay tax.

Many companies hide their discretion with respect to the 'where' question by asserting that they only do as the law instructs. But others have begun to acknowledge openly the reality that they retain significant choice with respect to international tax planning. As CSR has begun to effect changes in the language and mentality of business, this Article has highlighted how it might also influence corporate choice with respect to international tax. There is much work left to be done to bring these two fields into more fulsome conversation and to build out the substance of these new corporate tax norms, but first, they have to start asking each other the right questions.