



The Quasi-Global GILTI Tax

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Introduction

It has become more difficult to frame the taxation of global corporate profit as a matter of national tax policy. For decades, the consensus starting point gave the corporate income tax national boundaries. Now, it seems more comfortable to think of some elements of the corporate income tax as global or at least quasi-global taxes – sources of public revenues levied on a world-wide basis.¹

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¹ See Richard M. Bird, *Are Global Taxes Feasible?*, 25 INT'L TAX & PUB. FIN. 1372, 1373 (2018) (describing the concept of global taxes). Many commentators perceive a turning point in international tax policy. See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 354 (2020) (noting that BEPS embraces a new principle of “full taxation,” a norm that income should not escape tax). Some express interest in the idea of a move toward a more global tax as a policy matter. Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507, 517 (1997) (presenting the “single tax principle” and arguing that multinational corporations’ income should be subject to tax exactly once); Harry Grubert & Rosanne Altshuler, *Fixing the System: An Analysis of Alternative Proposals for the Reform of International Tax*, 66 NAT'L TAX J. 671 (2013) (supporting a minimum tax on overall global welfare grounds). See also Allison Christians & Tarcísio Diniz Magalhães, *The Rise of Cooperative Surplus Taxation*, (Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3687011 (arguing that the question of how to divide and tax “cooperative surplus” is open, analyzing fourteen different approaches to the problem, and recommending source-based withholding). Some criticize the idea of moving away from a national conception of the corporate income tax. See, e.g., Leopoldo Parada, *Full Taxation: the Single Tax Emperor’s New Clothes*, 24 FLA. TAX REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3636073, draft at 20 (raising rule-of-law concerns with the concept of single or full taxation); Daniel Shaviro, *What Are Minimum Taxes, and Why Might One Favor or Disfavor Them*, 40 VA. TAX REV. 395, 448 (2020) (arguing that “[the] compatibility with national welfare of a global minimum tax requires particular justification and cannot simply be assumed); see also MICHAEL P. DEVEREUX ET AL., THE OECD GLOBAL ANTI-BASE EROSION PROPOSAL 4 (2020) (criticizing the GloBE minimum tax proposal on the grounds that it considers “no or low taxation” a problem in itself and fails to allow countries where “real economic activities take place” to elect to impose a low or zero corporate tax rate). Another view is that GILTI is not global enough, and that international tax should pursue “structures designed to preserve a robust tax base for those states with the least.” Steven A. Dean, *GILTI, Tax Sparing 2.0 and International Tax Cooperation’s Next Golden Age*, 18 PITT. TAX REV. draft at 5, 8 (2021); see Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the “Liberia” Problem*, 70 EMORY L. J. __ (forthcoming 2021) (draft at 14-15) (arguing that through GILTI, the US exerts its power “to collect taxes belonging to low-tax jurisdictions”).

Perhaps the U.S. minimum tax on global intangible low-taxed income, or GILTI, approaches the global tax description.² The tax on GILTI, enacted in 2017 (as part of the “2017 Tax Act”),³ describes a tax base measured by the income of controlled foreign corporations, or CFCs, such as corporate subsidiaries of U.S.-parented multinationals.⁴ This tax base roughly equals non-subpart F CFC income in excess of a 10% exempt return on tangible assets.⁵ GILTI is included in U.S. shareholders’ tax base subject to the allowance of a 50 percent deduction, which means that GILTI is taxed at a lower U.S. rate.⁶ The tax on GILTI is reduced (but not below zero) by a foreign tax credit equal to 80 percent of foreign taxes paid or accrued on the same income, where foreign taxes are calculated in the aggregate and not on a per-country basis.⁷

GILTI thus seeks to ensure that tax is imposed on a certain kind of global income -- excess cross-border corporate profit.⁸ If tax is not imposed elsewhere on this income, then the United States will collect it. Professor Ruth Mason calls GILTI an example of a “fiscal fail-safe” that supports the new norm of full taxation.⁹ The United States does not tax GILTI where non-U.S. jurisdictions, in aggregate, impose corporate tax on GILTI at a rate that at least equals 62.5% of the maximum U.S. corporate rate.¹⁰ This threshold is 13.125% when the U.S. rate is 21%, as it has been from 2018 to 2020.

² GILTI was not explicitly designed to protect other nations’ corporate tax systems. Instead, it appears that the 2017 Act aimed to discourage profit-shifting to low-tax foreign subsidiaries. See Tim Dowd & Paul Landefeld, *The Business Cycle and the Deduction for Foreign Derived Intangible Income: A Historical Perspective*, 71 NAT’L TAX J. 729, 730 (2018) (“Taken together [GILTI and FDII] act as a stick and a carrot to discourage profit shifting out of the U.S.”); see also Kimberly A. Clausung, *Fixing Five Flaws of the Tax Cuts and Jobs Act*, 11 COLUM. J. TAX L. 31, 54–56 (2020) (observing that TCJA attempted to address not only perceived tax competition (through a lower rate) but also tax base erosion and noting the GILTI minimum tax as a base protection measure which was “more onerous than expected” by multinational corporate taxpayers). But the structure of GILTI has the capacity and potential to protect elements of the corporate income tax outside the U.S. See Susan C. Morse, *International Cooperation and the 2017 Tax Act*, 128 YALE L.J. FORUM 362, 376 (2018) [hereinafter Morse, *International Cooperation*] (arguing that GILTI supports a “consensus level of corporate tax” of 13.125%); Susan C. Morse, *GILTI: The Co-Operative Potential of a Unilateral Minimum Tax*, 4 BRIT. TAX REV. 512, 514 (2019) [hereinafter Morse, *GILTI*] (“[T]he post-TCJA US rules better protect the existence of the corporate income tax globally ... because the incentive to avoid foreign income tax altogether is reduced compared to the pre-TCJA regime.”).

³ Budget Fiscal Year, 2018, Pub. L. 115-97, § 14201, 131 Stat. 2054, 2208–12.

⁴ I.R.C. § 957(a) (defining CFC).

⁵ See I.R.C. § 951A (providing for shareholders’ current inclusion of GILTI, which is defined as non-subpart F income earned by a controlled foreign corporation in excess of net deemed tangible income return; net deemed tangible return equals 10% of qualified business asset investment (or QBAI, a measure of tangible asset investment) to the extent that 10% of QBAI exceeds net interest expense).

⁶ I.R.C. § 250(a) (allowing 50% deduction for GILTI).

⁷ See I.R.C. § 960(d) (allowing foreign tax credit for up to 80% of foreign taxes paid or accrued); I.R.C. § 904(d) (providing separate GILTI foreign tax credit limitation basket); I.R.C. § 904(c) (limiting foreign tax credit carryovers and carrybacks to offset tax on GILTI).

⁸ This is consistent with the OECD goal of base erosion protection. See OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 10 (2013) (addressing “instances where the interaction of different tax rules leads to double non-taxation or less than single taxation”). It is a departure from the OECD’s focus on “harmful” tax competition conducted by tax havens, in that GILTI implicitly objects to any tax competition that would offer rates below the implied minimum tax rate. See *id.* (defining “harmful tax competition” as “no or low taxation” that results from “practices that artificially segregate taxable income from the activities that generate it”).

⁹ Mason, *supra* note 1, at 370–73.

¹⁰ Under the assumption that jurisdictions calculate GILTI in the same way, for instance using similar base and timing rules.

The GILTI threshold thus sets an implied minimum tax rate at which excess cross-border corporate profit will be taxed. Because the threshold is measured in the aggregate, it does not allocate tax revenue among foreign jurisdictions. Although the tax on GILTI is not quite a source of public revenue levied on a worldwide basis, it approaches this definition, because it is collected without the consent of the affected jurisdiction and because the United States, as the enacting jurisdiction, does not specify how the tax will be allocated. This Article presents a thought experiment that considers the tax on GILTI as a quasi-global tax.

A minimum tax is also the centerpiece of the OECD’s “Pillar 2” Global Anti-Base Erosion, or GloBE, proposal.¹¹ However, unlike GILTI, the GloBE minimum tax proposal operates on a per-country basis. That is, the GloBE proposal anticipates that income will be allocated to affiliates operating in a particular jurisdiction. It also anticipates measuring the income taxes imposed by that jurisdiction. Dividing the taxes imposed by a jurisdiction by the income attributed to a jurisdiction reveals the effective tax rate. If that rate is too low, the “income inclusion rule” requires a parent company to impose tax instead.¹² The GloBE Pillar Two proposal also has backup rules to allocate default jurisdiction to tax where a parent corporation is located in a low-tax jurisdiction.¹³ GloBE thus takes on the task of allocating jurisdiction to tax and envisions that every jurisdiction will have a corporate tax rate that at least equals the set minimum. A Baker McKenzie report on Pillar 2 explains that the proposal “promises to be a tide that lifts all boats (whether jurisdictions like it or not) by setting a floor on acceptable ETRs.”¹⁴

GILTI (in contrast to GloBE) does not undertake to divide jurisdiction to tax as among non-U.S. jurisdictions. GILTI’s structural contribution consists of supporting the continued collection of a sum of corporate tax worldwide, on excess cross-border corporate profit, up to an implied minimum tax rate. The Biden administration has proposed changing the GILTI structure to per-country.¹⁵ But in this Article GILTI will be analyzed in its originally-enacted, aggregate form. In this aggregate form, aside from allocating between the U.S. and the rest of the world, division of jurisdiction to tax is not GILTI’s issue.

¹¹ OECD, TAX CHALLENGES ARISING FROM DIGITALISATION – REPORT ON PILLAR TWO BLUEPRINT 15–16 (2020) (describing GloBE “income inclusion rule and undertaxed payments rule”). *See also* Joachim Englisch & Johannes Becker, *International Effective Minimum Taxation – the GLOBE Proposal*, 11 *WORLD TAX J.* 483, 496-502 (2019) (describing design of GloBE proposal and comparing anti-profit-shifting properties of per-country approach to increased complexity).

¹² *See* OECD, *supra* note 11, para. 416, at 113 (“The [income inclusion rule] requires a taxpayer that is the ‘parent’ of the MNE group ... to pay top-up tax on its proportionate share of the income of any low-tax Constituent Entity in which that taxpayer has a direct or indirect ownership interest.”).

¹³ *See id.* para. 457, at 124 (explaining the undertaxed payment rule, which addresses a situation where a group parent does not impose an income inclusion rule and which “reduces the incentives for tax driven inversions”); *id.* para. 456, at 122 (explaining that allocation goes first in accordance with deductible payments made by group members to low-taxed group members and then in proportion to the total amount of net intra-group expenditure).

¹⁴ *See International Tax: Pillar Two – The New Normal for Effective Tax Rates*, BAKER MCKENZIE (Oct. 14, 2020), <https://insightplus.bakermckenzie.com/bm/tax/international-oecd-pillar-two-blueprint-released-full-summary-attorney-advertising>.

¹⁵ WHITE HOUSE, FACT SHEET: THE AMERICAN JOBS PLAN, March 31, 2021, available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> (proposing calculating GILTI “on a country-by-country basis so it hits profits in tax havens”).

GILTI calculates the tax imposed by non-U.S. jurisdictions on an aggregate basis. To see the difference between GILTI's aggregate approach and GloBE's per-country approach, consider a hypothetical multinational firm with two foreign subsidiaries. Assume further that the minimum tax rate (whether implied by the GILTI system or set by a GloBE approach) is 13.125%. Say one foreign subsidiary earns 100u and pays 26.25u in foreign tax, while a second foreign subsidiary earns 100u and pays 0u in foreign tax. Under the GILTI minimum tax system applicable to U.S.-parented multinationals, no additional tax will be due. Under the GloBE approach, the multinational firm will owe 13.125u in additional tax on the second foreign subsidiary's income, for instance to the country where the multinational parent is incorporated.¹⁶

Perhaps GILTI leaves more room for the consideration of innovative jurisdiction allocation methods. GILTI tax revenue might be allocated in accordance with factors that depend on labor force or environmental exploitation,¹⁷ or in accordance with a principle of declining marginal utility of public goods.¹⁸ Novel allocation approaches could proceed from unilateral action; multilateral negotiation is not required.¹⁹ The GILTI statute does not control allocation. It only makes a sum of corporate tax revenue available for division.

Part I of this Article discusses the idea of a global tax, as contrasted with a national corporate tax, and suggests why the label "quasi-global tax" might fit the tax on GILTI. Part II explains that unilateral U.S. GILTI guidance to date may strengthen the case for treating the GILTI tax as a quasi-global tax, even if it does not represent good national tax policy.

I. The Idea of a Global Tax

A. What is a Global Tax?

Professor Richard Bird has defined a "global tax" as a source of public revenues levied on a regional or world-wide rather than strictly national basis.²⁰ This suggests a framework for thinking about a global source of tax revenue as a two-step process. First protect it. Then divide it.

¹⁶ Assuming that the parent has enacted an income inclusion rule, which or roughly requires that it is not in a low-taxed jurisdiction.

¹⁷ Allison Christians & Laurens van Apeldoorn, *Taxing Income Where Value is Created*, 22 FLA. TAX REV. 1, 26–28 (2018) (proposing the use of arm's length pricing to allocate more profit to countries where labor force exploitation occurs and connecting the proposal to the principle of value creation).

¹⁸ Adam H. Rosenzweig, *Defining a Country's "Fair Share" of Taxes*, 42 FLA. ST. U. L. REV. 373, 415–16 (2015) (considering the allocation of tax base to developing countries, who will disproportionately benefit economically from marginal increases in the provision of public goods). Rosenzweig's analysis does not require a uniform or global corporate income tax as a starting point, but his point about declining marginal utility of public goods as an allocation factor could be layered on top of a robust global corporate tax base.

¹⁹ See generally TSILLY DAGAN, INTERNATIONAL TAX POLICY: BETWEEN COMPETITION AND COOPERATION 242–43 (2018) (exploring the cartelization disadvantages of OECD and similar multilateral fora for cooperation and considering regulated competition instead); see also Richard Bird & Jack Mintz, *Sharing the Wealth: Article 82 of UNCLOS – the First Global Tax?*, 4 BRIT. TAX. REV. 537, 540–41 (2019) (explaining that the U.S., Canada and other states with "broad coastal shelf claims" agreed to a global tax on revenues from deep sea drilling, with proceeds directed to landlocked developing countries, because of other benefits provided by the UNCLOS treaty).

²⁰ Bird, *supra* note 1, at 1373.

An example of a global tax is found in Article 82 of the United Nations Convention on the Law of Sea (UNCLOS).²¹ Article 82 requires natural resource firms to pay up to 7% of revenue from deep-sea extraction “through” the UN to nations who are parties to the UNCLOS treaty, “on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them.”²²

The Article 82 tax has several elements. It is (1) created by treaty; (2) due regardless of national jurisdictions’ decisions (other than the agreement with the treaty), (3) payable “through” a supranational organization, the UN; and (4) allocated based on global, not national, criteria. The Article 82 tax has ambiguities that are apparently left for resolution to the jurisdiction that collects – but does not retain – the tax.²³

B. GILTI as a Quasi-Global Tax

The GILTI minimum tax on excess cross-border corporate profit meets none of these elements in full, but it partly meets two of them. It approaches meeting element (2), because it is due regardless of national jurisdictions’ decisions, except the decision of the United States to impose it. Even if non-U.S. jurisdictions prefer that no corporate income tax is imposed on excess returns related to their jurisdictions, the United States requires tax to be paid. It also partly meets element (4) because of the absence of allocation criteria among non-U.S. jurisdictions. These features give GILTI global tax potential.

Another feature that causes GILTI to resemble a global tax is that it reaches a discrete international tax base. It provides a way to tax the kind of residual cross-border tax profit that otherwise escapes the conventional corporate tax system.²⁴ Excess cross-border corporate returns attributable to intangible property arguably differ from other corporate income. This is because they are particularly difficult to attribute to specific jurisdictions and particularly easy to avoid tax on.²⁵ Thus, although the tax on GILTI currently is collected as part of the corporate tax system, it also invites consideration as a discrete tax on a type of international profit.

Figure 1 diagrams the idea of a tax on GILTI as a global tax. It assumes identical methods for calculating GILTI (e.g., base and timing) for U.S. purposes and for foreign purposes.²⁶ It shows

²¹ See Bird & Mintz, *supra* note 19, at 537–38.

²² United Nations Convention on the Law of the Sea art. 82, Dec. 10, 1982, 1833 U.N.T.S. 397.

²³ Bird & Mintz, *supra* note 19, 543–45 (describing technical ambiguities and expressing skepticism at any assumption of good faith on the part of Canada’s administration of the tax in the case of projects like one in the Atlantic Bay du Nord field).

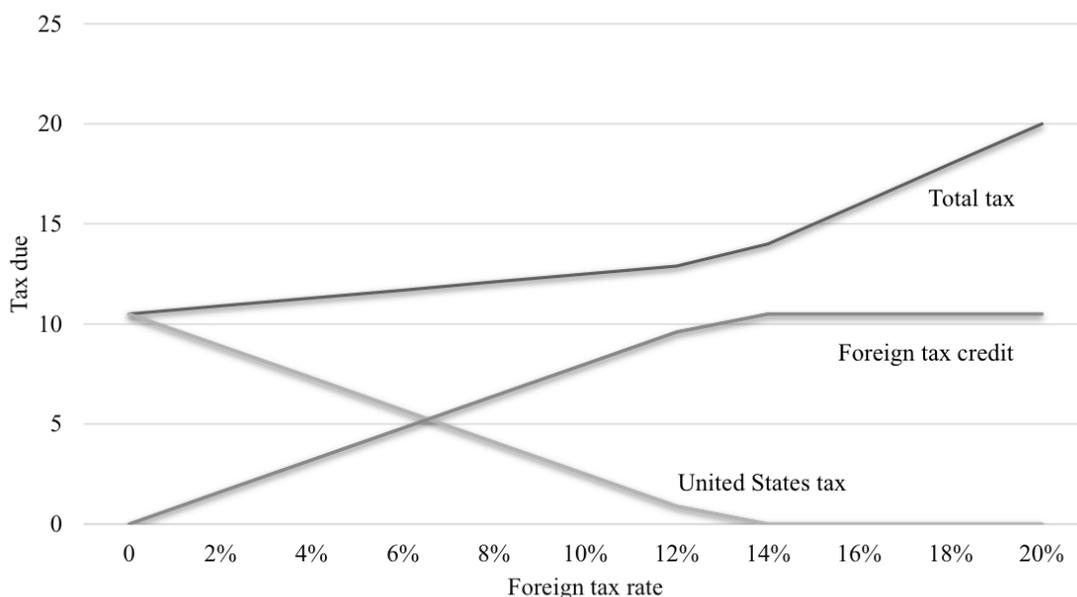
²⁴ See, e.g., Dhammika Dharmapala, *The Consequences of the Tax Cut and Jobs Act’s International Provisions: Lessons from Existing Research*, 71 NAT’L TAX J. 707, 716 (2018) (showing that the GILTI tax burden depends on the ratio of pretax foreign income to foreign tangible assets and concluding that the burden on domestic residence will increase for many firms under GILTI).

²⁵ Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 750–51 (2011) (summarizing data supporting “story in which firms driven by economic rents derived from high-value intangible assets (the pharmaceutical and technology companies, for example) find it particularly easy to generate stateless income, while consumer firms have somewhat less ability to do so, and natural resources firms face higher tax rates abroad”).

²⁶ In earlier work, I argued that GILTI’s implementation could encourage similar rules with respect to rate, timing and base, although it also presents arbitrage opportunities. Morse, *GILTI*, *supra* note 2, at 527–29. With respect to rate, the current structure of the U.S. minimum tax on GILTI creates incentives for taxpayers to plan so as to reduce

that so long as the foreign rate of tax is 13.125% or lower -- 62.5% or less of the U.S. rate -- the United States will allow 80% of the foreign tax credit against U.S. tax on GILTI. In other words, below this threshold, the United States will, mostly, reimburse the taxpayer for the tax on GILTI paid to the foreign jurisdiction.²⁷ As a result, for foreign rates of tax of 13.125% and lower, the U.S. tax decreases as the non-U.S. tax increases. Although the foreign tax credit is granted at 80%, not 100%, a central idea of the provision is that excess cross-border corporate profit – as GILTI – will be taxed somewhere, up to the implied minimum tax rate.

Figure 1: Tax Due Assuming GILTI = 100 Depending on Foreign Tax Rate



their average foreign tax rate to no more than the level that results in no supplemental U.S. tax. For instance, if a taxpayer’s foreign income is entirely within the GILTI system, this rate is 13.125%, because at this rate an 80% foreign tax credit will eliminate the otherwise applicable 10.5% effective U.S. tax rate on GILTI. (The rate is higher – 18.9%, when the U.S. rate is 21% -- if the taxpayer’s foreign income falls under the subpart F system, for instance because the taxpayer has high foreign taxes and wishes to carry losses from one year to another and thus elects out of GILTI.) With respect to timing, the concern has to do with when foreign taxes are paid compared to when they are credited by the United States. If, for example, a taxpayer could accrue unpaid foreign tax in a non-U.S. jurisdiction in Year 1, and credit it in the United States in Year 1, but not pay the unpaid foreign tax until a later year, then the taxpayer receives the time value of money benefit of a U.S. tax reduced before the related foreign tax is paid. *Cf. Ford Motor v. Comm’r*, 71 F.3d 209 (6th Cir. 1995). Timing arbitrage is facilitated by Treas. Reg. §§ 1.461-4(g)(6), (8) (explaining that the traditional “all events” test, rather than the more stringent, payment-required “economic performance” test, applies for foreign taxes). Another issue is raised if a foreign taxable event occurs in a year earlier than a related U.S. tax event. U.S. regulations allocate foreign taxes to foreign source income in this situation, without waiting for the corresponding U.S. taxable event. *See* Treas. Reg. § 1.861-20(d)(2), (g)(3) ex. 2 (2021); Treas. Reg. § 1.904-6 (cross-referencing Treas. Reg. § 1.861-20(d)(2) (2021)).

²⁷ Data suggest that in GILTI’s first year of operation, the United States imposed a residual tax rate on GILTI inclusions of about 5.5 percent, which implies that the foreign taxes credited with respect to GILTI exceeded the U.S. taxes paid on GILTI. *See* JOINT COMMITTEE ON TAXATION, U.S. INTERNATIONAL TAX POLICY: OVERVIEW AND ISSUES 60 (2021) (showing foreign tax credits of \$6.6 billion and GILTI tax liability of \$6.3 billion for 81 selected corporations in 2018).

C. Departing from the Established National Tax Framework

The idea of a global tax or quasi-global tax is uncomfortable because it presents a tension with our notion of jurisdictions' tax sovereignty. Professor Leopoldo Parada has objected to the idea of an international full taxation norm, which GILTI supports, on this ground. Parada argues that full taxation would amount to “imposing taxation just for the sake of taxation, releasing countries from their unwritten duty to provide valid reasons for taxing.”²⁸ Professor Daniel Shaviro has also criticized the GILTI minimum tax for its departure from tax policy justifications grounded in national welfare.²⁹

As Parada and Shaviro suggest, the idea of a global tax, such as a GILTI global tax on excess cross-border corporate profit, contrasts with the idea of corporate taxes as national taxes. It also differs from the idea of the system of international tax as an agglomeration of many national corporate taxes. The national tax concept focuses attention on the relationship of the corporate income tax to other parts of a single nation's tax system and economy. Similarly, the international tax concept imagines many national taxing jurisdictions competing and interacting with each other.

Historically, the more influential school of thought has aligned with the Parada and Shaviro views. This school of thought considers the corporate income tax a proxy for the taxation of shareholders residing in the same jurisdiction as the corporation.³⁰ This view has strongly influenced the work of economists who considered how the corporate tax could accomplish the taxation of capital income, such as profit allocated to shareholders, with a minimum of economic disruption. Classic analyses assumed that a nationally bounded corporation competed with other corporations in the same jurisdiction and had shareholders in the same jurisdiction.³¹ The national-tax starting point framed a discussion about whether the corporate tax should be integrated with the shareholder-level tax.³² Key issues included minimizing distortion of capital allocation within a national framework, for instance because different rules applied to

²⁸ Parada, *supra* note 1, draft at 20.

²⁹ See Shaviro, *supra* note 1, at 448 (noting tension between global minimum taxes and national welfare, particularly if corporations are owned by individuals resident in the same jurisdiction).

³⁰ Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 452 (2001) (arguing that the corporate tax was meant as a “substitute or ‘proxy’ for taxing shareholders directly”).

³¹ See Arnold C. Harberger, *The Incidence of the Corporation Income Tax*, 70 J. POL. ECON. 215, 227–30 (1962) (concluding that all capital bears the burden of a corporate income tax in a closed economy). In an open economy, there is a debate about the extent to which capital bears the burden of a corporate income tax. See generally Kimberly A. Clausing, *In Search of Corporate Tax Incidence*, 65 TAX L. REV. 433, 434–44 (2012). The Harberger model still may have strength when there is a similar change in tax rates “across many countries at roughly the same time.” Arnold C. Harberger, *The Incidence of the Corporate Tax Revisited*, 61 NAT'L TAX J. 303, 305 (2008).

³² THE AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: INTEGRATION OF THE INDIVIDUAL AND CORPORATE INCOME TAXES 169 (1993) (layering international considerations on top of core analysis of interaction between the U.S. individual and corporate income tax systems) (“The two principal international considerations that must be addressed in designing a shareholder credit integration system are (1) what should be the level of U.S. taxation of U.S. income earned by foreign investors in a U.S. corporation, and (2) how should foreign taxes paid by U.S. companies on foreign income affect the U.S. taxation of shareholders on distribution of the foreign earnings?”). See also Michael J. Graetz & Alvin C. Warren, Jr., *Integration of Corporate and Shareholder Taxes*, 69 NAT'L TAX J. 677, 678 (2016) (recommending “shareholder credit integration” in the international context).

corporations versus passthroughs, corporate debt versus corporate equity, and retained versus distributed earnings.³³

However, the concept of international tax as an agglomeration of national and sovereign corporate tax systems presents intractable problems for theorizing its component national parts. In particular, internationalization disrupts the ability to analyze a corporate tax as (1) a national tax that (2) should tax the capital income that supports shareholder profit (3) with minimal economic distortions.

For example, (1) is inconsistent with (3). That is, nationally determined corporate tax provisions that determine base and rate inevitably distort cross-border investment. Economists recommend that corporate income tax systems should be similar so as to minimize distortions caused when national tax provisions influence the choice of investment location.³⁴ But this recommendation of similar tax systems conflicts with the national tax premise that jurisdictions should make tax policy decisions in their own interest.

In addition, internationalization eats away at (2), the capacity of a national corporate income tax to serve as a proxy for taxing the capital income of shareholders in the same jurisdiction. It is difficult to say that a multinational corporation belongs to or is resident in any particular jurisdiction. This is true both because multinationals do business globally and because shareholders' nationality need not match the corporation's jurisdiction of incorporation.³⁵ Internationalization also exposes national tax systems to the risk of tax competition, which reduces the ability of the corporate tax to reach capital income. For instance, the average statutory corporate tax rate fell from 28.0% to 20.6% between 2010 and 2020.³⁶

In addition, the concept of international tax as an agglomeration of national tax systems seeks, in vain, a rational answer to the question of how to allocate taxing jurisdiction, or more concretely corporate taxable income, among jurisdictions. This exercise lacks any compelling theoretical justification. The leading idea about allocation of taxing jurisdiction relates to "benefits" taxation – which typically allocates taxing jurisdiction based on productive factors.³⁷

³³ THE AMERICAN LAW INSTITUTE, *supra* note 32, at 36 (1993) (listing corporate tax disincentives).

³⁴ See Michael Keen & Kai A. Konrad, *The Theory of International Tax Competition and Coordination*, in 5 Alan J. Auerbach et al., eds., HANDBOOK OF PUBLIC ECONOMICS 257, 269 (Alan J. Auerbach et al., eds., 2013) (recommending an equilibrium tax rate among countries to achieve optimal capital allocation). *But see* Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L. J. 543, 561 (2000) (arguing that tax competition permits jurisdictions to offer different packages of government services and creates "locational efficiencies").

³⁵ See Leonard E. Burman et al., *Is U.S. Corporate Income Double-Taxed?*, 70 NAT'L TAX J. 675, 683 (2017) (estimating that households held 27% of U.S. corporate equity in 2015, down from 80% in 1965, and that retirement plans account for 37% and foreign ownership for 25%); Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 TAX L. REV. 207 (2015) (arguing that it is difficult to determine beneficial ownership of stock).

³⁶ OECD, CORPORATE TAX STATISTICS 2, 9 (2d ed. 2020) (reporting statistics for statutory corporate tax rates of 109 jurisdictions).

³⁷ Avi-Yonah, *supra* note 1, at 517 (tracing the benefits principle to tax-treaty bargains struck in the 1920s); see also Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L. J. 1021 (1997). The benefits principle, of course, leaves little room for allocating tax revenue to the neediest states. Ilan Benshalom, *The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law*, 85 N.Y.U. L. Rev. 1 (2010) (arguing that the benefits principle focuses on commercial transactions and lacks a theory

But the contribution of different countries to a multinational's profit is not a discoverable economic fact.³⁸ Even the destination sales method³⁹ faces serious challenges including the problems of intermediate business-to-business sales and import and export controls.⁴⁰

This all suggests that the nationally-anchored theory of corporate taxation of global profit, although historically dominant, is no longer equal to the challenge of analyzing the contemporary issues presented by the international corporate tax. But on the other hand, what can be said in favor of unilateral reasons to accept global taxation of excess cross-border profit?⁴¹ Is it possible to defend, from a unilateral perspective, a system that collects tax using a global or quasi-global tax while remaining agnostic about which jurisdiction collects the tax revenue?⁴² Stated slightly differently, and specifically in relation to GILTI: Why might the United States support the collection of corporate tax on excess cross-border profit, rather than accepting zero tax on such profit, even if the United States might not itself collect the resulting corporate revenue for the U.S. fisc?

There are several principled reasons why a jurisdiction might support a corporate tax from which it would collect no revenue. One reason is regulation of corporations, which is a justification proposed from the beginning in the U.S. as one reason for the existence of a corporate tax.⁴³ One example of using the tax system to regulate is tax-based requirements for disclosing information, such as amounts of income and tax related to specific jurisdictions. Another example is the imposition of wartime excess profits taxes.

Another reason is distributive. Taxing corporate income is an indirect way of taxing capital income. High-income and high-wealth individuals disproportionately earn capital income and possess an enormous share of income and wealth in the United States and other jurisdictions. Perhaps this distributive inequity is a negative externality, for instance because the functioning of representative political systems is disrupted by extreme wealth and income inequality. Taxation of capital income can make progress to reduce wealth and income inequality regardless of what country receives the revenue.

of distributive justice and that the benefits principle leaves little room for allocating tax revenue to the neediest states).

³⁸ See Hugh J. Ault, *Some Reflections on the OECD and the Sources of International Tax Principles*, 70 TAX NOTES INT'L 1195, 1200 (2013) ("The basic problem is that there is no real economic content to the notion of source of income; it is just a taxing claim that isn't based on the personal characteristics of the recipient of the income but some activity or transaction that has some connection with the jurisdiction.").

³⁹ See generally MICHAEL P. DEVEREUX ET AL., TAXING PROFIT IN A GLOBAL ECONOMY 267–333 (2021) (making the case for taxation based on destination sales).

⁴⁰ Rosanne Altshuler & Harry Grubert, *Formula Apportionment: Is It Better Than the Current System and Are There Better Alternatives?*, 63 NAT'L TAX J. 1145, 1171–73 (2010) (considering problems related to exports and imports); Julie Roin, *Can the Income Tax Be Saved? The Promises and Pitfalls of Adopting Worldwide Formulary Apportionment*, 61 TAX L. REV. 169 (2008) (describing tax planning opportunities including deconsolidation).

⁴¹ There is also the possibility of a global purpose for tax revenue, such as to address a global problem like climate change.

⁴² Cf. Catherine Sharkey, *Punitive Damages as Societal Damages*, 115 YALE L. J. 347, 398 (2003).

⁴³ Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1196 (2004); Marjorie Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L. J. 53, 113 (1990); Ajay K. Mehrotra, *The Public Control of Corporate Power: Revisiting the 1909 U.S. Corporate Tax from a Comparative Perspective*, 11 THEORETICAL INQUIRIES L. 497, 537 (2010).

A tax planning reason for retaining a corporate tax even without revenue relates to the relationship between the corporate income tax and the individual income tax. This idea is that the corporate income tax should be collected at a positive rate that avoids creating an incentive for individuals to use the corporate form to shelter income from tax, for instance by using a corporation instead of a flow-through entity like a partnership. Minimizing the tax shelter potential of the corporate form does not require that the same jurisdiction exact tax on the shareholder and the corporation. It only requires that the corporation pays tax to some jurisdiction, somewhere.

Finally, there is an economic efficiency reason for supporting a corporate tax globally regardless of revenue. This reason relates to relative tax rates. Different effective corporate tax rates across jurisdictions cause distortions in the location of economic activity, since firms will have a tax incentive to make investments in the lower-tax jurisdictions. A global minimum tax limits these tax-rate distortions, although it does not eliminate them. Economists who have focused on this issue have objected to GILTI because the minimum tax rate is less than the otherwise applicable corporate rate and because GILTI has an aggregate approach, in contrast to a per-country approach.⁴⁴

D. Flexibility in Allocating Global Tax Revenue

One feature of a global tax is that it need not pretend that jurisdictions' claims on revenue are a matter of correct theory. GILTI approaches the problem of allocating jurisdiction largely by ignoring it.⁴⁵ Said differently, it leaves this problem to future politics.

Non-U.S. jurisdictions can determine how to divide the tax revenue protected by a U.S. tax on GILTI. For instance, they might agree to allocate GILTI based on factors that favor Country A rather than to Country B. Or, Country A might decide to impose a high tax rate and Country B a low tax rate. Or, Country A might decide to claim more tax jurisdiction, for instance by adopting transfer pricing rules that favor Country A. For instance, if Country A is a developing country, Country A might establish transfer pricing rules that allocate jurisdiction to tax based on location savings. Such decisions would shift tax revenue supported by the GILTI tax to Country A.⁴⁶

GILTI's refusal to allocate taxing jurisdiction means that there is not a per-jurisdiction requirement for a minimum tax rate. Low-tax jurisdictions can continue to use low tax rates to

⁴⁴ See *infra* note 15 (describing argument for per-country approach); *infra* note 47 (same).

⁴⁵ Cf. Grubert & Altshuler, *supra* note 1, at 690–91 (acknowledging that a minimum tax would leave “an incentive to shift income out of the United States.”).

⁴⁶ The idea is related to the idea of “soak-up taxes,” which mean taxes imposed by one jurisdiction because of the fact that another jurisdiction will credit them. But the term “soak up” is not precisely correct, because a foreign jurisdiction would presumably not explicitly condition its taxation of GILTI on the U.S. granting of a foreign tax credit and thus would avoid the specific definition of soak-up taxes under U.S. regulations. See Treas. Reg. § 1.901-2(c) (2013). Compare Morse, *International Cooperation*, *supra* note 2, at 375 (suggesting that GILTI might “soa[k] up” non-U.S. income taxes).

attract foreign direct investment or tax haven-facilitated transactions. The GILTI tax has drawn criticism on that ground.⁴⁷

But detaching the project of establishing a global tax from the project of allocating tax revenue or jurisdiction might allow fresh thinking about how to allocate tax jurisdiction. Allocation could still proceed according to well-known ideas such as the benefits principle.⁴⁸ But revenue from a global tax on excess cross-border corporate profit could also be allocated in accordance with more radical and innovative proposals. Residual tax revenues might be held in trust for less wealthy nations.⁴⁹ Revenue could be allocated in accordance with location savings factors that depend on labor force exploitation⁵⁰ or to those nations that lack infrastructure, based on the idea of the declining marginal utility of public goods.⁵¹

As enacted, GILTI's allocation of jurisdiction to tax the excess cross-border corporate profit it describes is limited to dividing jurisdiction between the U.S. and the rest of the world. Further, as explained in Part II, GILTI as implemented under U.S. unilateral guidance has limited the income subject to primary U.S. jurisdiction. Thus, the tax on GILTI continues to leave open the question of how its revenue ought to be allocated.

One way to highlight the revenue allocation space left open by GILTI is to compare it with a per-country approach like GloBE. Consider the situation from the perspective of a country that wishes to advance an innovative approach to dividing jurisdiction to tax. For instance, such a country might be a developing country that aims to increase its share of corporate tax revenue by using a location savings factor in its transfer pricing analysis. This country's options for pursuing this goal unilaterally are greater under GILTI than under the per-country approach of GloBE.

Under the aggregate GILTI approach, a developing country that favors a more innovative approach to dividing corporate tax revenue retains the ability to use unilateral action to advance its goals. It can in effect propose a different allocation of income by adopting a unilateral rule to that effect. For example, the country might amend its transfer pricing rules to claim that location savings should result in a greater allocation of corporate tax revenue to its jurisdiction.

Under the per-country approach, the income allocation rules are controlled by the architects of the minimum tax. In the case of GloBE, an OECD agreement would apparently determine allocation rules. If the U.S. were to adopt a per-country GILTI law as the Biden administration has proposed, U.S. law would presumably determine allocation rules. Under a per-country

⁴⁷ Kimberly A. Clausing, *Profit Shifting Before and After the Tax Cut and Jobs Act*, 73 NAT'L TAX J. 1233, 1234 (2020) (noting that GILTI may make the U.S. the least desirable place to book revenue for excess-limitation firms, who have an incentive to allocate profits to low-tax jurisdictions instead, and advocating a per-country alternative).

⁴⁸ See Avi-Yonah, *supra* note 1.

⁴⁹ Dean, *supra* note 1, at __.

⁵⁰ Christians & van Apeldoorn, *supra* note 17, at 27–28 (proposing the use of arm's length pricing to allocate more profit to countries where labor force exploitation occurs and connecting the proposal to the principle of value creation).

⁵¹ Rosenzweig, *supra* note 18, at 415–16 (2015) (considering the allocation of tax base to developing countries, who will disproportionately benefit economically from marginal increases in the provision of public goods). Rosenzweig's analysis does not require a uniform or global corporate income tax as a starting point, but his point about declining marginal utility of public goods as an allocation factor could be layered on top of a robust global corporate tax base.

framework, a developing country that sought to claim a greater share of corporate tax jurisdiction through an innovative allocation rule could not do so through unilateral action. Instead, that country would have to work through the OECD negotiation process or the U.S. political process to further that goal. This is because a top-down income allocation mechanism would determine the imposition of a minimum tax regardless of a particular country's unilateral efforts to change the allocation game.⁵²

Whether a developing country would prefer the forum of multilateral negotiation or the avenue of unilateral action to advance its preferences is open to debate.⁵³ Multilateral negotiation may offer developing nations a seat at a negotiating table. But it does not guarantee the opportunity to advance a desired position, such as an innovative allocation method based on location savings or another source-country-favorable factor.⁵⁴ Unilateral action may lack the stability and consensus of an arrangement developed at the OECD. But if a developing country cannot influence a multilateral negotiation process, then the possibility of unilateral action may be more promising.

The choice between a per-country minimum tax like GloBE or an overall minimum tax like GILTI is also a choice about whether multilateral or unilateral action will develop income or jurisdiction allocation methods. A per-country approach with an allocation method negotiated in advance leaves little room for future unilateral innovation on jurisdiction allocation. A minimum tax with an overall or aggregate approach, like GILTI, leaves more room for the future possibility of changes in allocation through unilateral action.

⁵² There is also a contrast between a per-country approach adopted by the U.S. (as the Biden administration has proposed) and a per-country approach developed by the OECD (i.e., GloBE). If the U.S. prescribes a per-country approach, the U.S. allocates jurisdiction among many non-U.S. countries. The U.S., rather than the OECD, would say what amount of excess cross-border profit is allocated to each and what amount of non-U.S. tax will be given shelter by U.S. foreign tax credit, at least for U.S.-parented multinationals. This is part of what is at stake in the ongoing debate about global minimum taxes.

⁵³ Compare Steven Dean, *A Constitutional Moment in Cross-Border Taxation*, 33 (N.Y.U. L. Sch. Tax Pol'y Colloquium, Working Paper 2020) (suggesting more sweeping reform featuring the inclusion of "a more diverse group of decisionmakers" beyond the ranks of the OECD) with Tsilly Dagan, *The Costs of International Cooperation*, in *THE WELFARE STATE, GLOBALIZATION AND INTERNATIONAL LAW* 49, 67 (Eyal Benvenisti & Georg Nolte eds., 2004) (arguing that unilateral foreign tax credit mechanisms, not treaty-based credits, "allow home countries to take a larger bite of the tax revenue pie").

⁵⁴ See Dagan, *supra* note 53, at 74-75 (arguing that in a multilateral negotiation, developed countries can bargain together as a group and shift tax jurisdiction to the benefit of residence countries, to the disadvantage of developing nations); Tarcisio Diniz Magalhaes, *What is Really Wrong With Global Tax Governance and How to Fix It*, 10 *WORLD TAX J.* 499, 504 (2004) (arguing that the "technical discourses" that dominate international tax policy discussion have not furthered the interests of developing countries in part because these discourses conceal "normative assumptions about what is right and wrong, what is fair and unfair, while denying the presence of ideologies and entrenched power relations"); see also Diane Ring, *International Tax Relations: Theory and Implications*, 60 *TAX L. REV.* 83, 92 (2007) (noting the connection between "knowledge and belief systems" and international tax).

II. U.S. GILTI Guidance, Featuring Expense Allocation

A. Deduction Allocation and Apportionment

Tax administration questions might arise with respect to GILTI's unanswered questions about allocation of jurisdiction to tax. Professors Bird and Mintz focused on administrative questions in their analysis of Canada's efforts to administer the Article 82 global tax on deep-sea mining revenue.⁵⁵ If the U.S. may not collect much or any tax revenue from GILTI, what incentive do U.S. administrators have to administer the tax? Would U.S. administrators claim increasing amounts of GILTI tax base for the U.S., quietly undermining the quasi-global nature of the tax?

As it turns out, the concern extended by U.S. tax administrators to U.S.-parented multinationals has produced rules that forfeit tax jurisdiction, rather than claiming more of it. These guidance decisions may not make good national tax policy. But they do preserve a larger part of the GILTI tax revenue pie for other nations to divide. This may help support the potential of GILTI as a quasi-global tax.

An example, relating to the assignment of deductions to U.S. and non-U.S. income, should help illustrate.

After the enactment of GILTI, U.S. tax administrators quickly faced the question of how multinational taxpayers should assign deductions, including overhead deductions such as interest and research and experimentation, or R&E, for purposes of the foreign tax credit. This regulatory story highlights two opposing tax administration tactics that might maximize national outcomes.⁵⁶ One tactic is tax competition. This means reducing tax collected in a national jurisdiction. This may improve national outcomes because it makes a nation a more attractive destination for investment. The other tactic is tax collection. This means increasing tax collected in a national jurisdiction. This may improve national outcomes because it increases corporate tax revenue.

One might expect U.S. GILTI guidance to follow a tax collection tactic and assign GILTI tax revenue to the United States. That would seem to favor U.S. interests. But in general, that is not what has happened. Instead, U.S. guidance generally has adopted a tax competition approach.⁵⁷ This Part illustrates this pattern using the example of the allocation of the overhead deductions of interest and R&E expense. U.S. guidance has assigned these deductions away from GILTI and to U.S. source income.

⁵⁵ See *supra* note 23 (discussing tension between global taxation and unilateral administration).

⁵⁶ See Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311 (2018) (relating how jurisdictions use both tax competition and tax collection tactics).

⁵⁷ See Rebecca M. Kysar, *The New Tax Legislative and Regulatory Process*, 73 NAT'L TAX J. 1135, 1146-49 (2020) (explaining Treasury actions consistent with taxpayer lobbying that expanded the high-tax exception election and maximized the calculation of the exempt return under GILTI).

These guidance decisions may not make good national tax policy. But they do preserve a larger part of the GILTI revenue pie for other nations to divide. This may help support the potential of GILTI as a quasi-global tax.

A technical challenge facing U.S. administrators is that GILTI does not work as advertised when U.S. and non-U.S. rules calculate GILTI differently. If all jurisdictions agree on the GILTI base, then the relatively simple and elegant result diagrammed in Figure 1 is the result. If they disagree, then the foreign tax credit mechanism begins to falter.

The foreign tax credit mechanism links the U.S. and non-U.S. systems and promises relief from U.S. tax contingent on the payment of non-U.S. tax. It operates through the foreign tax credit limitation, which equals the tentative U.S. tax (i.e., calculated before the foreign tax credit) multiplied by a fraction. The numerator of the fraction is the taxpayer's foreign-source income and the denominator is the taxpayer's worldwide income.⁵⁸ The higher a taxpayer's foreign-source income, the higher the foreign tax credit limitation and the more foreign taxes might be credited against U.S. tax liability.

Deductions work in the opposite direction. That is, if allocated to a taxpayer's foreign source income, they reduce foreign source income, reduce the foreign tax credit limitation, and reduce the amount of foreign tax that might be credited against U.S. tax liability. GILTI is a type of foreign income.

The policy problem deepens because some expenses are difficult to connect specifically to a category of gross income.⁵⁹ These include general and administrative expenses; interest; and R&E. In many countries, a tracing approach is used for these kinds of deductions, even though they might be thought of as more whole-firm or overhead kinds of expenses.⁶⁰ A tracing approach might locate interest deductions entirely in the United States, if for instance, the U.S. parent corporation directly borrowed money. A tracing approach likewise might locate R&E deductions entirely in the United States, if for instance, the U.S. parent corporation directly employed the individuals involved in research.

In contrast, in the United States, prior to the 2017 Tax Act and related regulations, worldwide formulary approaches applied to several kinds of overhead expenses. These regulations proceed from the reasonable assumption that some expenses, such as interest and R&E, are related to a taxpayer's foreign source income as well as to U.S. source income. They allocate the expenses

⁵⁸ See I.R.C. § 904(a); H. David Rosenbloom, *The U.S. Foreign Tax Credit Limitation: How It Works, Why It Matters*, 166 TAX NOTES FED. 1591 (2020).

⁵⁹ Other expenses are easier to assign based on a factual or tracing approach. Salaries paid to employees who provide services the firm sells offer one example. These kinds of expenses are generally assigned via tracing in U.S. and non-U.S. jurisdictions. See HUGH J. AULT ET AL., *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 502 (4th ed. 2020) (“[Business deduction rules] generally focus on the factual or ‘causal’ connection between the expenditure and the income.”). Jurisdictions have different ways of achieving this result. In the U.S., regulations first allocate deductions “definitely related to a class of gross income” and then apportion between statutory groupings such as U.S. and foreign source income, for purposes of the foreign income tax credit. See Treas. Reg. § 1.861-8T(c) (2020); see generally CHARLES H. GUSTAFSON ET AL., *TAXATION OF INTERNATIONAL TRANSACTIONS* 132-34 (4th ed. 2011) (summarizing U.S. approach for allocating and apportioning deductions).

⁶⁰ See AULT, *supra* note 59, at 503–05 (discussing rules in Canada, Japan, Sweden, Germany, The Netherlands, and Australia).

formulaically, in part to foreign source income. They use a formula rather than a tracing approach, which would allocate the expenses more to U.S. source income.⁶¹ This generally resulted in a U.S. attribution of more deductions to foreign source income, as compared to non-U.S. jurisdictions' approach.

If the United States allocates deductions to foreign-source income, but a foreign jurisdiction does not allow the deductions of the same expense, then the U.S. calculation of the GILTI base is smaller than the foreign calculation of that base for purposes of calculating foreign income tax. As a result, the foreign tax credit limitation can be smaller than the foreign tax paid. This is true even if the foreign tax is paid at a rate that is at or above the threshold rate that is supposed to be the implied minimum tax rate, meaning 13.125% under current law. An example is a railroad with high interest costs that operates in the United States and in Mexico, where the tax rate is 30%.⁶²

Post-GILTI, the U.S. rules have taken a step back toward the factual or tracing approach that is still standard among non-U.S. jurisdictions. The political economy reason for this shift is that convergence toward a factual or tracing approach supports the interests of the multinational corporations that form Treasury's strong regulatory lobby. The shift to tracing rules helps multinationals in two ways – by increasing their foreign tax credit limitation, and by allowing deductions against U.S.-source income, which is typically subject to tax at a higher rate. This shift has occurred both for interest expense and for R&E expense.

B. Interest

The U.S. interest expense allocation regulations historically provided a stark example of the formulary approach. These generally required the allocation of certain U.S. interest expense to foreign income of CFCs on the basis of assets owned or income earned by CFCs, regardless of whether the CFC itself was a named borrower.⁶³ So, for example, assume that a U.S. parent owned a single CFC, and that the U.S. parent and the CFC had equal assets (including equal asset basis) and equal gross income. Assume further that the U.S. parent borrowed from a bank and accrued 100 of interest annually. The interest expense would be allocated evenly between the U.S. parent and the CFC. This is shown in the first column of Table 1. This contrasts to the more common tracing rule, under which the interest expense would be allocated entirely to the U.S. parent. This is shown in the second column of Table 1.

⁶¹ See, e.g., Treas. Reg. § 1.861-8(e)(5) (2020) (stating that legal and accounting expenses might be allocated to all of a taxpayer's gross income).

⁶² Richard Rubin, *New Tax on Overseas Earnings Hits Unintended Targets*, WALL ST. J., (Mar. 26, 2018), <https://www.wsj.com/articles/new-tax-on-overseas-earnings-hits-unintended-targets-1522056600> (giving the example of Kansas City Southern, which saw an incentive to move borrowing from the U.S. to Mexico).

⁶³ See Treas. Reg. §§ 1.861-9T(a) (requiring interest expense allocation and apportionment and stating the rationale that “money is fungible” and “interest expense is attributable to all activities and property”); (f)(3)(ii) (election available to CFCs); (g) (asset method); (j) (modified gross income method).

Table 1: Interest Expense Allocation
With U.S. Parent Borrowing and Equal U.S. Parent and CFC Income and Assets

	Pre-TCJA U.S. formulary approach	Usual non-U.S. tracing approach	2019 regulations compromise approach
Interest expense allocated to U.S.	50	100	67
Interest expense allocated to CFC	50	0	33

In the case of interest deductions, the final regulations promulgated after the 2017 Tax Act take a step toward the typical law of foreign jurisdictions. Instead of allocating interest deductions to GILTI per the historic formulary approach, the regulations instead treat a portion of GILTI income as exempt income that will not attract any interest expense allocation.⁶⁴ For instance, when a 50% deduction may be claimed for GILTI income, half of that income is treated as exempt and will not attract an allocation of interest expense from the U.S. shareholder to the foreign source income of the CFC.

Table 1 illustrates the result produced by the interest deduction regulations under the GILTI regulations. It assumes that all the CFC's income is GILTI and that a 50% deduction applies. As the last column of Table 1 shows, the U.S. GILTI regulations establish a middle position that lies between the view of the United States and the view of a typical foreign jurisdiction on the allocation of interest deductions arising when a U.S. parent of a multinational is the named borrower.

The U.S. adoption of an interest deduction middle path in its GILTI regulations produces a U.S. revenue loss. Allocating deductions to the United States rather than to a non-U.S. jurisdiction reduces U.S. tax revenue in two ways. First, it reduces taxable income subject to the full 21% U.S. corporate tax rate. Second, it increases the foreign tax credit limitation.

Both results mean less corporate tax revenue for the United States. Also, both results mean that the United States yields tax jurisdiction to another nation which can step in to increase its tax burden on multinationals. For instance, since this deduction allocation decision generally increases firms' foreign tax credit limitation, it makes more room for other countries to impose corporate income tax that the United States will then credit at 80 cents on the dollar.

C. Research & Experimentation Expenses

Similarly, in the allocation and apportionment of deductions for research and experimentation (R&E) expense within a multinational firm, and from the perspective of the U.S. tax administrator, assigning R&E deductions to U.S. source is a tax competition move. This

⁶⁴ Treas. Reg. § 1.861-8T(d)(2) (providing that exempt income is not taken into account for apportionment); Treas. Reg. § 1.861-8(d)(2)(ii) (defining exempt income and exempt asset to include a portion of section 951A inclusions and the value of CFC stock that produces 951A inclusions); Treas. Reg. § 1.904(b)-3 Example (illustrating).

approach will directly reduce U.S. taxable income and thus U.S. tax paid by multinationals. Not only that, but also the allocation of R&E deductions to U.S. source income will increase foreign source income, increase the foreign tax credit limitation, and increase the ability of foreign tax to reduce U.S. tax through the foreign tax credit mechanism.

In contrast, from the perspective of the U.S. tax administrator, assigning R&E deductions to non-U.S. source is a tax collection move. This approach prevents such deductions from directly reducing U.S. source income and U.S. tax. It also reduces the foreign tax credit limitation.

The issue of R&E deduction allocation and apportionment and its interaction with GILTI has recently been addressed by U.S. regulators. The regulations had in mind R&E deductions related to R&E activity that takes place in the U.S. and supports the operations of a U.S.-parented multinational firm worldwide. Some comments on the U.S. R&E regulations take a tax collection view and oppose the decision to allocate R&E deductions to U.S. source.⁶⁵ Others take a tax competition view and support the decision to allocate R&E deductions to U.S. source.⁶⁶ In both cases, the arguments focus on the U.S. national interest, not on the global tax potential of the GILTI regime.

In the end, the regulations declined to allocate such R&E deductions to GILTI, other subpart F income, or dividends from foreign subsidiaries.⁶⁷ This has the effect of allocating a larger part of such deductions against U.S.-source income. In other words, the R&E allocation and apportionment regulations take a tax competition approach, consistent with the preferences of the U.S.-parented multinationals that play a strong role in regulatory lobbying.⁶⁸ The step toward tracing is even more dramatic in the case of R&E expense compared to interest expense.

D. U.S.-Source Overhead Deductions as Poor National Tax Policy

The commentators that oppose the direction of the U.S. deduction regulations, and instead support the continued assignment of overhead deductions like interest and R&E to foreign GILTI income, make the better national policy argument. To see why, first observe an obvious feature of GILTI, which is that it explicitly builds in a rate differential depending on whether or not income is attributed to the United States. We might say, to a first approximation, that the GILTI minimum tax results in a 21% rate on U.S. income and a 13.125% rate on non-U.S. income.

⁶⁵ See, e.g., Stephen E. Shay et al., *Why R&D Should Be Allocated to Subpart F and GILTI*, 167 TAX NOTES FED. 2081, 2088 (2020) (focusing on the importance of protecting the U.S. fisc).

⁶⁶ Paul W. Oosterhuis & Moshe Spinowitz, *Why Treasury Got it Right: R&D Should Not Be Allocated to GILTI*, 99 TAX NOTES INT'L 1467, 1476 (2020) (focusing on competitiveness and “good economic policy”).

⁶⁷ Treas. Reg. § 1.861-17(b) (providing for allocation to gross intangible income and excluding from the definition of gross intangible income “dividends or any amounts included in income under section 951 or 951A”).

⁶⁸ Note that it would be possible for other jurisdictions to follow the U.S. lead and achieve a similar, or cooperative, approach to the allocation of R&E deductions. For instance, jurisdictions might decide to allow domestic deductions when it comes to R&E conducted domestically (for instance, by employees based in their jurisdiction). They might also decide to deny tax deductions for R&E conducted elsewhere. If all countries choose a tax competition tactic for domestic activity and a tax collection tactic for foreign activity, the result would converge, so that the same rule is followed across jurisdictions.

Thus, the system accepts and endorses the distortion of different tax rates for different income.⁶⁹ This rate differential is consistent with legislative intent, regardless of the economic distortion that might result.

But the distortion is exacerbated in a way apparently not consistent with legislative intent if guidance shifts allocation and apportionment of overhead-type expenses away from exempt or lower-taxed GILTI. It is generally acknowledged that deductions related to lower-taxed GILTI should only be allowed at the minimum tax rate.⁷⁰ They should not be allowed at a higher tax rate, which is what happens if they are allocated against U.S. income. The issue is the same as presented by any dividend exemption system, where “in principle the exemption system should extend only to *net* foreign income.”⁷¹ No suggestion has been made that deductions clearly related to GILTI, such as cost of goods sold related to sales revenue, should instead be allocated against U.S. source income. And the U.S. formulary approaches for allocating interest and other overhead expenses to foreign income were well established in law at the time of GILTI’s enactment. The most reasonable assumption is that Congress legislated against that assumed background regime.

If deductions that support exempt foreign income are allocated instead to domestic income, then the result is that a multinational taxpayer, in addition to the benefit of an exemption for foreign income, also gets the benefit of a lower rate on U.S. income. The United States not only refrains from taxing GILTI. It also reduces the tax collected on U.S. income because it allows deductions against U.S. income even though the expenses were understood to support foreign income instead under longstanding U.S. expense allocation practice and law. Thus, the guidance hands multinationals a tax break on U.S. income beyond what was anticipated by the statute. It increases the preferential treatment given to multinational corporations compared to corporations with wholly domestic operations.

E. U.S.-Source Overhead Deductions as Promising Global Tax Policy

The regulations described above that shift deductions to U.S. source income also have a corollary global tax effect. Recall that the new rules in general come closer to conforming with non-U.S. jurisdictions’ law. That is, these changes that allocate deductions to U.S. source income push the U.S. rules toward other countries’ tracing approach. They may weaken U.S. tax policy, as they incorrectly allocate deductions away from the exempt income the related expenses support. But the deduction allocation decisions may simultaneously strengthen the capacity of the tax on GILTI to act as a quasi-global tax.

⁶⁹ The rate differential is also consistent with the tax rate reduction offered for foreign-derived intangible income, which in practical terms results from exports. Thus, there is a lower rate offered for cross-border excess corporate profit whether earned in CFCs from foreign operations (GILTI) or earned from exports (FDII). See I.R.C. § 250(b).

⁷⁰ See Grubert & Altshuler, *supra* note 1, at 693 (explaining that expense allocations to income abroad should only be allowed to offset that income).

⁷¹ AULT, *supra* note 59, at 471 (emphasis added) (“Accordingly, deductions related to the exempt foreign-source income should not be deductible against taxable domestic or foreign-source income.”); Stephen E. Shay, *Addressing an Opaque Subsidy for Foreign Income* (Working paper, 2021) draft at 21 (arguing that IRC § 265 disallows deductions allocable to an amount of income offset by a “GILTI exemptive deduction”).

The United States' willingness to move toward other countries' allocation rules provides some evidence that the structure of the minimum tax tends to push different countries' rules towards convergence and away from the specific influence of national tax system rules. This is consistent with the idea of a global tax. There is no evidence that the convergence we observe in the base allocation rules is because of any commitment the U.S. administrators have to the concept of a global tax. Multinational lobbying pressure provides the plausible explanation. Nevertheless, it provides an interesting example of unilateral administration producing globally similar results.

The fact of base convergence is an advantage that might support the continued existence of GILTI. Similar base calculations make the tax simpler and easier to understand and incorporate into a non-U.S. jurisdiction's tax policy. Greater similarity for base rules means that the tax on GILTI may serve as a better model for a minimum tax globally.

It is also notable that the U.S. GILTI guidance follows a tax competition tactic and refrains at the margin from claiming more GILTI tax revenue for the United States. It will cost the U.S. fisc to allocate deductions to U.S. source, because this decision reduces U.S. taxable income and increases the foreign tax credit limitation. This is poor national tax policy, in part because it increases (and unevenly) the distortions between U.S. corporations with multinational businesses and U.S. corporations with wholly domestic businesses, as mentioned above. But it might be good global tax policy, since it strengthens the status of GILTI as a quasi-global tax whose revenue allocation is unspecified by the nation that imposes it.

Conclusion

It is useful to consider the tax on GILTI as a quasi-global tax, separated conceptually from national corporate tax systems. GILTI is exacted on a specific category of corporate income – excess cross-border profit. It is due without the consent of all affected nations. In its original, aggregate design – without a country-by-country approach -- it does not specify how to allocate the revenue collected. Considering GILTI as a quasi-global tax suggests reasons why a country such as the United States might want a tax on global cross-border profit even if that country does not collect the resulting tax revenue.

The quasi-global tax framework also provides the opportunity for innovation in the allocation of taxing jurisdiction. GILTI's design allows nations to unilaterally propose tax revenue allocation approaches based on unconventional factors such as labor force exploitation or declining marginal utility of public goods. The U.S. statute logically accommodates such possibilities because it declines to say how revenue resulting from the minimum tax should be allocated as between non-U.S. jurisdictions.

The U.S. administration of GILTI has generally declined to claim more tax collection rights over GILTI for the United States. Instead, the tax competition oriented administration of GILTI has included the allocation of deductions away from GILTI and to U.S. source income instead. This widens the tax burden difference between domestic-only corporations and multinational corporations beyond the difference contemplated by the U.S. statute. But, as a silver lining, the decision to conform to other countries' deduction allocation methods may strengthen GILTI as a quasi-global tax.