

# BEPS: Endgame

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## *Abstract*

*By all accounts the international tax regime is facing a transformational moment marking the end of international tax avoidance by multinational corporations through a concerted global effort at tax reform spearheaded by the Organization for Economic Cooperation and Development (“OECD”) under its Base Erosion and Profit Shifting (“BEPS”) project. BEPS initially began as a technical project to identify and propose remedies for many of the more complex and persistent planning techniques in cross-border taxation. After a series of remarkably successful breakthroughs, however, the scope of BEPS grew into a much more ambitious project with the OECD identifying fifteen specific action items it would pursue with the ultimate goal being the emergence of a single set of global rules and principles agreed to by nearly every country in the world. To this end, in 2022 the OECD announced that over one hundred countries had entered into an agreement to establish a global minimum corporate tax—the first of its kind. Both the U.S. Secretary of Treasury and the President of the United States hailed the agreement as the beginning of the end of international corporate tax evasion forever.*

*Despite these remarkable successes, however, BEPS has also faced a number of delays and disappointments throughout the process. For the most part, especially given its recent successes, these setbacks have been dismissed as minor “speed bumps” along the way toward an ultimate comprehensive final agreement. But what if this was not the case? What if these small but recurring setbacks actually comprise a feature of the BEPS negotiations rather than a bug? In such case,*

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*dismissing or disregarding these setbacks might not only mean they will continue to recur but under certain conditions could ultimately undermine the success of the entire project itself. This article will directly confront these setbacks by analyzing them within the framework of international negotiation theory, and in particular recent strands of the negotiations literature sometimes referred to as “False Negotiations” theory. In doing so, this article will identify the conditions under which certain states may be actively engaged in the negotiation process and even cooperative on major issues but ultimately do not have an incentive for the process to result in a final negotiated solution but rather are actively engaged in the negotiations solely to maintain a state of perpetual negotiations. In short, there are conditions under which prolonged negotiations would be preferable to either a successful or failed final negotiated agreement. In such cases, the result would be a repeated loop of negotiations marked by periods of remarkable success followed shortly by recurring minor setbacks significant enough to delay the process but not so significant to cause the negotiations to fail. If true, these incentives must be incorporated into any BEPS analysis before any final outcome might be possible. In other words, BEPS can finally break out of its cycle of False Negotiations and finally enter its endgame.*

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## I. INTRODUCTION

On July 1, 2021, the Organization for Economic Cooperation and Development (“OECD”) announced one of its most monumental achievements in its history—over 130 countries representing over ninety percent of global GDP had entered into an agreement to adopt and implement for the first time ever a universal “Global Minimum Tax” on corporations which had been negotiated and agreed to by the so-called Inclusive Framework of countries pursuant to Action Item One as part of the larger fifteen action item OECD “Base Erosion and Profit Shifting” (“BEPS”) project.<sup>1</sup> Secretary of Treasury Janet Yellen called it “a historic day for economic diplomacy” and declared that “the race to the bottom is one step closer to coming to an end.”<sup>2</sup> Similarly, President Biden announced that “[t]oday marks an important step in moving the global economy forward to be more equitable for workers and middle class families in the United States and around the world.”<sup>3</sup> A few months later, in October 2021, the OECD announced with even greater enthusiasm that a formal framework and timetable to

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1. *See 130 Countries and Jurisdictions Join Bold New Framework for International Tax Reform*, OECD (Jan. 7, 2021), <https://www.oecd.org/newsroom/130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm> [https://web.archive.oecd.org/2021-07-08/593841-130-countries-and-jurisdictions-join-bold-new-framework-for-international-tax-reform.htm]. The Global Minimum Tax comprises one pillar of Action Item One under the umbrella of the BEPS project, which is made up of a total of thirteen Action Items. *See also* OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (2013), <http://dx.doi.org/10.1787/9789264202719-en>.

2. Press Release, U.S. Dep’t of the Treasury, Statement from Secretary of the Treasury Janet L. Yellen on Today’s Agreement of 130 Countries to Support a Global Minimum Tax for the World’s Largest Corporations (July 1, 2021), <https://home.treasury.gov/news/press-releases/jy0255>.

3. Press Release, The White House, Statement by President Joe Biden on Today’s Agreement of 130 Countries to Support a Global Minimum Tax for the World’s Largest Corporations (July 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/01/statement-by-president-joe-biden-on-todays-agreement-of-130-countries-to-support-a-global-minimum-tax-for-the-worlds-largest-corporations/>.

implement the Global Minimum Tax proposal had been adopted that would fully implement the Global Minimum Tax by the end of 2022.<sup>4</sup>

The optimism about what seemed inexorable momentum towards a fully implemented program by the deadline did not last long. By February 2022, progress on the Global Minimum Tax was reportedly “stalled.”<sup>5</sup> In April 2022, the OECD announced that “rather than waiting for a comprehensive document to be ready” as anticipated by the implementation plan it would instead release smaller “building block[s]” of the plan to “allow work to continue in parallel, in order to remain within the political timetable agreed in October 2021.”<sup>6</sup> By June 2022, the New York Times announced that the “global agreement to increase taxes on corporations is in jeopardy,”<sup>7</sup> and in January 2023, Nigeria (one of the largest and most influential emerging economy countries involved in the Inclusive Framework) announced that it could no longer support the Global Minimum Tax proposal as currently drafted.<sup>8</sup> By July 2023, the Secretary General of the United Nations

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4. Among these steps included the development of a Multilateral Convention about taxing the digital economy and a Multilateral Instrument to coordinate rules regarding the Global Minimum Tax. *See International Community Strikes a Ground-Breaking Tax Deal for the Digital Age*, OECD (Aug. 10, 2021), <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm> [https://web-archiv.e.oecd.org/2021-10-20/612898-international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm].

5. Upamanyu Lahiri, *Stalling Progress on Global Minimum Tax*, COUNCIL ON FOREIGN RELS., (Feb. 25, 2022, 3:55 PM), <https://www.cfr.org/blog/stalling-progress-global-minimum-tax>.

6. *OECD Launches Public Consultation on the Tax Challenges of Digitalisation with the Release of a First Building Block Under Pillar One*, OECD (Apr. 2, 2022), <https://www.oecd.org/tax/beps/oecd-launches-public-consultation-on-the-tax-challenges-of-digitalisation-with-the-release-of-a-first-building-block-under-pillar-one.htm> [https://web-archiv.e.oecd.org/2022-02-04/623499-oecd-launches-public-consultation-on-the-tax-challenges-of-digitalisation-with-the-release-of-a-first-building-block-under-pillar-one.htm].

7. Alan Rappeport, *A Tax Deal, in Trouble*, N.Y. TIMES, (June 7, 2022), <https://www.nytimes.com/2022/06/07/briefing/global-minimum-tax.html>.

8. Ruth Olurounbi et al., *Nigeria Snubs Global Tax Deal in Sign It Won't Work for All*, BLOOMBERG (Jan. 19, 2023, 2:22 AM), <https://www.bloomberg.com/news/articles/2023-01-19/nigeria-snubs-global-tax-deal-in-sign-it-won-t-work-for-all>. As objections begin to creep back into the process, certain exceptions have been proposed that were intended to address such concerns but which are of a type that, at least some commentators have expressed, might

(“UN”) issued a report calling into question the OECD process and called for the UN to take an active role in negotiating international tax proposals such as the Global Minimum Tax to better represent the interests of developing and emerging countries.<sup>9</sup>

How could a proposal receiving near-unanimous support from over one hundred countries around the world with few if any foreseeable technical obstacles begin to collapse less than a year after being proposed? Most explanations tend to be political in nature: entrenched special interest groups use their political power to prevent effective implementation through lobbying or similar pressure on lawmakers.<sup>10</sup> Yet little actual evidence that this theory is correct has been produced. If, in fact, lobbying is not the sole cause of such delays, the exclusive focus on political lobbying could not only be misplaced but could also be obscuring the true underlying structural cause.

Implicit in this analysis comes a critique of the unstated assumption underlying most if not virtually all the debate surrounding the Global Minimum Tax—that coming to an agreement in principle represents the end of the process. If anything, however, at least under multiparty international negotiation theory, the general consensus tends to be the opposite—agreements in principle are not the end of the process but rather just the beginning; disparate interpretations and intentions while implementing the details of any such agreement can, and often do, easily derail execution of the deal, sending the parties back to negotiations to repeat the process.<sup>11</sup>

To this end, the question that arises therefore is whether there is something inherent in the structure or nature of the Global Minimum

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ultimately undermine the success of the proposal itself. *See, e.g.*, Lilian V. Faulhaber, *Pillar Two’s Built-In Escape Hatch*, 76 NAT’L TAX J. 167, 169–70 (2023).

9. *See* U.N. Secretary-General, Promotion of Inclusive and Effective International Tax Cooperation at the United Nations, ¶¶ 5–6, U.N. Doc. A/78/235 (July 26, 2023).

10. *See* Laura Davison, Yellen’s Grand Global Corporate Tax Plan Risks Flop in Congress, BLOOMBERG (May 18, 2022, 7:58 AM), <https://www.bloomberg.com/news/articles/2022-05-18/yellen-s-grand-global-corporate-tax-plan-risks-flop-in-congress>; Karl Evers-Hillstrom, Business Groups, Sensing Victory, Keep Up Pressure over Tax Hikes, THE HILL (Oct. 27, 2021, 6:00 AM), <https://thehill.com/business-a-lobbying/business-a-lobbying/578624-business-groups-sensing-victory-keep-up-pressure-over>.

11. *See* Daisung Jang et al., *More Than a Phase: Form and Features of a General Theory of Negotiation*, 12 ACAD. MGMT. ANNALS 318, 321 (2018).

Tax negotiations that could allow for an agreement to be reached but at the same time create delays or disruptions in its implementation. This article directly addresses that question; more specifically, this article will propose that it is precisely the infrastructure of the negotiations over the Global Minimum Tax itself that allows for an agreement to emerge while at the same time making it difficult if not impossible to fully implement that agreement. It does so by applying the so-called “False Negotiations” strand of the negotiation theory literature, which identifies and explains the conditions under which active negotiations can become trapped in a never-ending cycle of negotiations.

Not only does a cycle of perpetual negotiations better describe the experience of the Global Minimum Tax debate than other current theories, it also can provide insights into how this cycle can be overcome to allow the negotiations to enter their endgame. Applying these insights, a counter-intuitive solution begins to emerge—that the only way to make a successful negotiated agreement possible would be to increase the chances of reaching no negotiated agreement at all. In other words, the only way to make a successful end of the negotiations possible is to make any end of the negotiations possible. Part II provides a brief survey of negotiations theory in general as background for a discussion of the False Negotiations literature in particular. Part II then generalizes and extrapolates the lessons of the False Negotiations literature to apply the theory to tax negotiations. Part III then turns to summarize the BEPS negotiations process, including both its more notable successes as well as a few of its infamous shortfalls. Part IV then combines the two to describe and explain how False Negotiations theory provides a much closer fit to the actual experiences in the BEPS negotiations than current existing theories and then proposes some counter-intuitive solutions that emerge as a result.

## II. NEGOTIATION THEORY: PROCESS AND OUTCOMES

### *A. Introduction to Negotiation Theory*

Negotiation plays a crucial part in most types of transactions, ranging from private transactions such as mergers and acquisitions to forms of alternative dispute resolution (“ADR”) such as mediation or arbitration to international law agreements such as treaties and

multilateral institutions and almost everything in between.<sup>12</sup> While the context may vary significantly, negotiations, broadly speaking, involve two or more parties who can potentially enter into an agreement that could result in a joint surplus but who also could end up worse off. As a result, the negotiations identify ways in which the parties can create the joint surplus while, at the same time, each party ensures they protect their own interests or avoid unexpected pitfalls.<sup>13</sup>

Negotiation theory emerged in the twentieth century to identify, understand, and analyze commonalities in structure, form, and substance particular to negotiations across multiple contexts.<sup>14</sup> Negotiation theory does so by combining elements of legal analysis, game theory, behavioral economics, psychology, and other fields and applying theoretical, experimental, and empirical methods. From this perspective, negotiation theory typically begins with a rational actor game theory model, with each party entering the negotiation with their own preferences that are unknown to the other.<sup>15</sup> Based on those preferences, each party establishes a negotiating spectrum space between their ideal decision point, or the terms they would set unilaterally, and their so-called “reservation price,” which is the lowest price at which the party would consider entering into an agreement.<sup>16</sup> To the extent the negotiating space of the parties overlaps there is a “Zone of Possible Agreement” (“ZOPA”), or the set of points in which all negotiating parties could at least theoretically agree as rational actors under the terms of the model.<sup>17</sup>

Each party’s negotiation space that falls outside of the ZOPA consists of a set of decision points which the party can achieve unilaterally. Of these, at least one decision point represents that party’s

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12. See Jeff Hawkins & Neil Steiner, *The Nash Equilibrium Meets BATNA: Game Theory’s Varied Uses in ADR Contexts*, 1 HARV. NEGOT. L. REV. 249, 253–55 (1996) (book review).

13. In other words, the negotiations are intended to address information asymmetries. See Heather Parola & Kimberly M. Ellis, *M&A Negotiation Stage: A Review and Future Research Directions*, 12 ADVANCES MERGERS & ACQUISITIONS 33, 34–35 (2014); Jane Frecknall-Hughes & Erich Kirchler, *Towards a General Theory of Tax Practice*, 24 SOC. & LEGAL STUD. 289, 302–03 (2015).

14. See generally CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (9th ed. 2012) (describing the negotiation process).

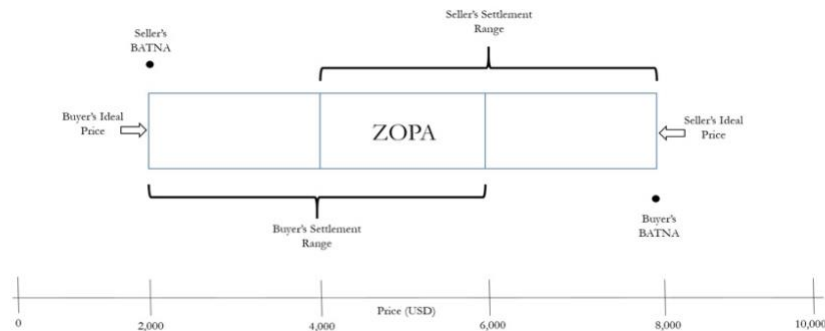
15. See *id.* § 2.01

16. See *id.* § 6.02(4)(a).

17. See *id.* § 6.02(4)(c).

“Best Alternative to a Negotiated Agreement” (“BATNA”). For each party, that party’s BATNA constitutes the highest payoff possible which the party can achieve unilaterally in the absence of a negotiated agreement. In other words, a party’s BATNA acts as a floor below which that party has no incentive to agree such that if all potential agreements have a lower payoff than the BATNA the party would unilaterally opt for the BATNA instead.<sup>18</sup> Chart 1 provides a visual representation of a simple two-party negotiation, such as buying a new car. Entering into the negotiation, the car is listed at the seller’s ideal price and the seller also knows the lowest price it will accept, while the buyer knows their ideal price as well as the highest price it was willing to pay. The overlap of these ranges represents the ZOPA. Assuming the parties have already committed to the sale of the car, and all that is being negotiated is price, the BATNA for each of the buyer and seller is accepting the other’s ideal price.

**Chart 1**



18. See JEANNE M. BRETT, *NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES* 13–14 (3d. ed. 2007) (defining BATNA). In addition, parties may also have a “Worst Alternative to a Negotiated Agreement” (“WATNA”), which in effect is the lowest payoff possible that can be imposed on that party by another party without that party’s agreement. From this perspective, the WATNA could be thought of as one particular outcome within a set of BATNAs. For this reason, this article will refer to them collectively as BATNAs.



### *B. Negotiation Theory: The Importance of Stages*

Under the rational actor game theory model, the ZOPA and BATNA create a set of incentives for each party which can be utilized to understand the incentives towards certain strategic interactions of the parties, at least as an initial matter. Negotiations are not a one-time interaction; they involve a series of strategic interactions over time between the parties.<sup>19</sup> Negotiation theory divides these interactions into separate “stages” which, very broadly defined, include the following: (1) Preliminary Stage, (2) Information Stage, (3) Distributive Stage, and (4) Closing Stage.<sup>20</sup> The point of transition between each stage is the point where the primary incentives of the parties change in some significant way.<sup>21</sup>

The Information Stage is sometimes referred to as the “Value Creation” stage while the Distributive Stage is sometimes referred to as the “Value Claiming” stage.<sup>22</sup> As these names indicate, the Value Creation stage is the stage where the parties can identify a potential cooperative surplus through information sharing or other means that would not otherwise be available to the parties acting independently. Simply put, the Value Creation stage is where the parties can grow the total “pie” available. Once the parties have maximized the value of the cooperative surplus, the incentives of the parties then switch from how to “grow” the pie to how to “divide” the pie, the Value Claiming stage.

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19. See Daniel Druckman & Mara Olekalns, *Punctuated Negotiations: Transitions, Interruptions, and Turning Points*, in HANDBOOK OF RESEARCH ON NEGOTIATION 332, 335 (Mara Olekalns & Wendi L. Adair eds., 2013).

20. See CRAVER, *supra* note 14, § 11.02(7).

21. See generally RAY FELS & NOA SHEER, *EFFECTIVE NEGOTIATION: FROM RESEARCH TO RESULTS* (3d. ed. 2016). In game theory terms, it is possible for two parties with fixed payoff functions to transition from a cooperative game at one stage to a non-cooperative game model at a different stage. See Deborah M. Kolb, *Staying in the Game or Changing It: An Analysis of Moves and Turns in Negotiation*, 20 NEGOT. J. 253, 259 (2004) (discussing “moves” parties make in negotiations).

22. CRAVER, *supra* note 14, §§ 6.01, 7.01. Unfortunately, the identical term “value creation” is already in use in the international tax literature to refer to an unrelated theory that identifying where value is created can be used to identify the situs of income for tax purposes. See Wolfgang Schön, *Value Creation, the Benefit Principle and Efficiency-Related Allocation of Taxing Rights*, in 9 TAXATION AND VALUE CREATION 155, 155 (Werner Haslechner & Marie Lamensch eds., 2021). For purposes of this article, the term Value Creation will be used only to have its meaning under negotiation theory.

Crucially, it is at this point that each party faces a new set of incentives—from working together to competing over how to maximize their share of the cooperative surplus. In other words, the Value Claiming stage is a zero-sum game unlike the Value Creation stage.<sup>23</sup>

Within the framework of each strategic stage, the parties then decide on certain tactics particular to that stage.<sup>24</sup> In other words, during a cooperative stage parties may have to decide whether to disclose certain information to the other party; conversely, in a non-cooperative stage, parties must determine whether to make concessions to the other side or to escalate through the use of threats.<sup>25</sup> For example, during the Information Stage both parties must determine whether to be the first party to make an “initial offer” and under what conditions.<sup>26</sup>

The final Closing Stage is identified not by a change in incentives of the parties but rather by a contracting of options available to the parties. In other words, once all the parties have completed the Value Creation and Value Distribution stages, no additional value can be generated by further negotiations and no further potential agreements can be identified. As a result, only two choices remain for each party: (1) accept one of the negotiated agreements identified as lying within the ZOPA, or (2) reject any negotiated agreement and choose their BATNA. For this reason, the Closing Stage can also be thought of as the Endgame Stage.

Because the Endgame Stage is defined based on the facts and circumstances of any particular negotiation, its usefulness as an analytical tool can only be retroactive in nature. In other words:

To explain the negotiated outcome, the analyst must first identify the negotiation’s phases through a retrospective analysis of the negotiation process. This entails identifying the event that established a negotiation and its date, the event that brought closure to a negotiation and the date of that event, and the dates of all other critical

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23. See CRAVER, *supra* note 14, § 7.01 (describing the Competitive/Distributive stage’s purposes generally).

24. See *id.* § 7.04(1) (discussing different strategies used by negotiators).

25. See *id.* §§ 7.01, 9.01.

26. *Id.* § 6.02.

moments, which are often highlighted as phases or stages of negotiation process.<sup>27</sup>

A theoretical analysis of the impact of the negotiation *process* on any particular negotiated *outcome* is retroactive in nature, i.e., it begins with a known outcome of a particular negotiation which is used as a starting point to identify and analyze each stage of the negotiation in reverse order going back to the start of the negotiation.<sup>28</sup> This stands in stark contrast to a so-called “practical” analysis which focuses more on substantive matters of particular negotiations rather than generalized theories of negotiation process.<sup>29</sup>

Traditional negotiation theory as described above was developed with respect to two-party negotiations. As would be expected, the analysis grows more complex when extrapolated to the multiparty context, specifically the international context. While several different approaches have been developed, one particular approach that has been applied to the OECD context involves a five-step analysis: (1) negotiation architecture, (2) context, (3) structure and relationship, (4) process, and (5) decision-making.<sup>30</sup>

Regardless, one crucial factor distinguishes multilateral negotiations from bilateral negotiations—the presence of at least three or more negotiating parties. While this might seem obvious on its face, there is a deeper more fundamental point: because negotiation parties are defined by incentives, multilateral negotiations must involve at least three parties all with distinct incentives. By contrast, a negotiation involving several parties all of which fall into one of two sets of incentives should be analyzed as a two-party negotiation. In other words:

At a minimum, a multilateral negotiation involves at least three unitary decision makers who are engaged in solving a problem or pursuing an opportunity. Adding a third primary party to a bilateral negotiation transforms a

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27. Larry Crump, *Analyzing Complex Negotiations*, 31 NEGOT. J. 131, 141 (2015).

28. *Id.*

29. Geoffrey R. Martin, *The “Practical” and the “Theoretical” Split in Modern Negotiation Literature*, 4 NEGOT. J. 45, 48 (1988).

30. *See* Crump, *supra* note 27, at 133.

bilateral encounter into a multilateral encounter, and coalition dynamics then emerge as a salient force, a phenomenon that is typically observed in international multilateral negotiations.<sup>31</sup>

Thus, before analyzing any particular set of negotiations, it is important first to identify the set of incentives facing the parties in a particular context so as to determine the proper framework in which to analyze the negotiations.

Crucially, one implicit assumption throughout all the different negotiation models is that the ultimate goal of all the parties entering into a negotiation is to reach a final resolution one way or the other.<sup>32</sup> A recent strand of literature has begun to call this assumption into question, however. In short, this line of literature posits that it can be possible either at the start of negotiations or at one of the later stages for one or more of the parties to face a set of incentives in which they would rationally choose an indefinite state of negotiation without conclusion.<sup>33</sup> Put differently, is it possible to engage in a set of negotiations with no endgame?

Perhaps the best and most familiar analogy involves the role of endgames in chess.<sup>34</sup> Dating back to the sixteenth century,<sup>35</sup> chess grandmasters have emphasized the role of the endgame.<sup>36</sup> As just a few examples:

In order to improve your game, you must study the endgame before everything else. For whereas the endings

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31. *Id.* at 139.

32. *See* FELS & SHEER, *supra* note 21, at 16–22.

33. *See* Krishnan S. Anand et al., *Getting to NO: Theory and Evidence for Instrumental Negotiations*, SSRN, May 2008, at 1–2, <https://ssrn.com/abstract=1127882>.

34. *See generally* Diogo Marques, *The Endgame or a Wake?: Tropes of Circularity in Literature Then and Now*, 2.2 COUNTERTEXT 191, 200–08 (2016) (explaining how chess endgames, and to some extent other images, are used as circulatory imagery in literature).

35. *See* Michael J. McGrath, *Introduction* to RUY LÓPEZ, *THE ART OF THE GAME OF CHESS* 10 (Michael J. McGrath ed. & trans., The Catholic University of America Press 2020) (1561).

36. *See generally* A.J. ROYCROFT, *THE CHESS ENDGAME STUDY: A COMPREHENSIVE INTRODUCTION* (Dover Publ'ns 2d ed. 2016).

can be studied and mastered by themselves, the middle game and opening must be studied in relation to the end game.<sup>37</sup>

[A] knowledge of the Endings is quite as essential to a chess player as a knowledge of the Openings . . . . This is the high art of chess springing from a disciplined adherence to maxim and rule, with the aid of imagination and analysis.<sup>38</sup>

Yet despite this strong consensus on the importance of endgames, precisely what defines the endgame and how to analyze, study, and perfect it in chess remains elusive.<sup>39</sup>

Rather than delve into the technical details specific to chess, what is relevant for this analysis is that the development of the rules of chess ultimately created the possibility of endgames where neither player can win and the game is declared a draw.<sup>40</sup> The familiar “stalemate” occurs when no King is in check and no party has a legal move.<sup>41</sup> There are a number of other somewhat less familiar draw rules that also exist in chess which, unlike stalemate, do not apply automatically but rather must be affirmatively invoked by a player. None of these are stalemates because they all involve situations where at least one legal move remains available but none of those moves can win the game (or at least not within any reasonable timeframe). One such rule is the 50-move rule which provides that if neither party can win after fifty moves, one player may declare a draw.<sup>42</sup> A similar but distinct rule is threefold-repetition (and the related perpetual check rule).<sup>43</sup> Threefold repetition occurs when the players repeat the same

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37. IRVING CHERNEV, *CAPABLANCA'S BEST CHESS ENDINGS* at V (2012) (quoting Jose Raul Capablanca).

38. EDWARD FREEBOROUGH, *CHESS ENDINGS: A COMPANION TO CHESS OPENINGS ANCIENT AND MODERN* 12 (1891).

39. *See generally* JOHN BEASLEY & TIMOTHY WHITWORTH, *ENDGAME MAGIC* (Dover Publ'ns 2d ed. 2017) (1996); NUNN, *supra* note 38.

40. *See* INT'L CHESS FED'N, *FIDE LAWS OF CHESS* art. 9 (2018), <https://www.fide.com/FIDE/handbook/LawsOfChess.pdf>.

41. *Id.* art. 5.2(a).

42. *Id.* art. 9.3.

43. *Id.* art. 9.2.

two moves three times in a row, other non-repeating legal moves are available, and neither player will be better off by playing any move other than repeating. Perpetual check is similar except that it applies when one player is able to place the other player's king in "check" on every move no matter what move is made in response but cannot force checkmate. In effect, both situations apply to forms of perpetual loops or cycles where the game could theoretically continue to be played forever without ever producing a winner. In such cases, the rules allow for a draw.

What relates these chess rules to strategic negotiations is that the draw must be invoked by one of the players; they do not apply automatically. As a result, it is possible for one player to choose to seek a perpetual loop intentionally as a playing strategy. In other words, a player who is losing during the midgame might strategically decide to give up trying to win and instead play for a draw. This might seem strange given that the goal is to win, but in a situation where winning realistically is no longer an option for one player, a draw suddenly becomes more appealing as an alternative to losing.<sup>44</sup> What these rules demonstrate, albeit in a different setting, is that even parties to a negotiation who enter the negotiation with every intent to achieve a successful outcome and who play by all the rules could, depending on the circumstances, change their strategy to one of forcing perpetual negotiations as a form of "draw" in much the same way as chess. For this reason, it is important to analyze the conditions under which such a strategy could arise.

### *C. Indefinite or Perpetual Negotiations*

In a world where a state of indefinite negotiation is a possible outcome of a negotiation, it can often be the transition from the active stages of negotiation to the endgame that proves crucial to success and not the substantive negotiations themselves. In other words, if at least one party believes the endgame will present a choice between either a

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44. Three-fold repetition played a crucial role in several of the famous exhibition games between chess grandmaster Garry Kasparov and the supercomputer Deep Blue, being invoked not only by Kasparov but also by Deep Blue and demonstrating that at least under certain circumstances choosing an infinite loop can be rational (at least for a chess-playing computer). See *Man vs Machine*, GARRY KASPAROV, <https://www.kasparov.com/timeline-event/deep-blue/> (last visited Sept. 30, 2023).

bad negotiated deal or a bad BATNA then that party might well choose simply to prolong the negotiations at every stage thus avoiding transitioning to the endgame. This can be true even where both parties enter into a negotiation fully intending to reach a final agreement and negotiate in good faith. This theory has recently begun to be introduced in a number of different lines of negotiations literature through the concepts of Stalling and False Negotiations which have a particular impact on Multiparty Negotiations.

### 1. Stalling

The concept of indefinite negotiations has recently been introduced into the traditional litigation bargaining model to explain why parties may engage in costly negotiation and/or litigation when they could save those costs by entering into a settlement.<sup>45</sup> In short, under the traditional litigation model under full information, both parties know exactly the risk of winning or losing in litigation and thus can easily apply backward induction to determine a present value settlement without engaging in the transaction costs of litigation. Under this model, the only reason that parties would choose to enter into costly negotiations or litigation would be some lack of complete information by one or both parties. The new stalling model challenges this conclusion:

A widely-held assumption in the study of litigation and settlement is that if litigation is costly and settlement bargaining is costless, then in a complete-information setting, all disputes will settle with no need for litigation. This assumption is mistaken. Even with complete information, perfectly rational parties may fail to settle without the plaintiff first spending resources to file suit, only for the parties thereafter to settle the filed lawsuit. This inefficient outcome occurs because, outside of litigation, a strategy of stalling may be optimal for a

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45. See William H. J. Hubbard, *Stalling, Conflict, and Settlement* 4–6 (Univ. of Chi. Coase-Sandor Inst. for L. & Econ., Research Paper No. 839, 2018), <https://ssrn.com/abstract=3127761>; see also Antonio Merlo & Charles Wilson, *Efficient Delays in a Stochastic Model of Bargaining*, 11 *ECON. THEORY* 39, 39–40 (1998).

defendant, and the plaintiff's only alternative is (costly) litigation.<sup>46</sup>

The stalling model takes the standard model and introduces a tangible benefit to delay or deferral (collectively referred to as stalling) for one party. The party who benefits from stalling, therefore, has the incentive to use negotiations to delay the final outcome rather than settle upfront. More specifically, the party benefiting from delay would be expected to use negotiations to stall so long as the benefit of stalling is greater than the cost of negotiation.<sup>47</sup>

The other party to the litigation under full information, now faces a very different set of payoffs since negotiation is costly to them and they do not benefit from stalling. Settlement up front is not an option so the choice comes down to engaging in costly negotiations or engaging in costly litigation. If the cost of litigation does not exceed the cost of negotiation, litigation is a more attractive option because litigation provides certainty of a final outcome. Hence, by adding in a time value benefit from stalling, this model, for the first time, introduces a rational reason why parties with full information might choose litigation.<sup>48</sup> At least one empirical study has found evidence consistent with this theory under certain conditions.<sup>49</sup>

## 2. False and Insincere Negotiations

In many ways, False Negotiations (or insincere negotiations)<sup>50</sup> are similar to stalling in that the introduction of a time-value element between the start of negotiations and the end of negotiations creates an incentive for one party to delay entering into a final agreement even

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46. Hubbard, *supra* note 45, at 1.

47. *See id.* at 19, 22.

48. *See id.* at 10–13.

49. Yun-chien Chang & William Hubbard, *New Empirical Tests for Classic Litigation Selection Models: Evidence from a Low Settlement Environment*, 23 AM. L. & ECON. REV. 348, 365–67 (2021).

50. Polly Kang et al., *Insincere Negotiation: Using the Negotiation Process to Pursue Non-Agreement Motives*, 89 J. EXPERIMENTAL SOC. PSYCH. 103981, at 2 (2020) (“We introduce a new term, insincere negotiations, to describe negotiations in which a negotiator has non-agreement goals.”).



under full information.<sup>51</sup> The key difference is that the stalling model is situated in the litigation settlement model and thus provides a rational explanation for one party (the plaintiff) to opt for costly litigation to prevent the other party (the defendant) from extracting greater cost by stalling while the False Negotiations model applies to negotiations without the option to choose a litigated judgment. In other words, under False Negotiations, the only alternative to negotiation is the party's BATNA but crucially, the BATNA is not available to that party unilaterally. The authors of a 2015 study of False Negotiations provide the following explanation:

False negotiators believe that their BATNA—which is based on their expectations for the outcome of future events or future negotiations—is superior to any proposal they could realistically receive *at present* from the other party. In other words, they do not expect to reap greater benefits from an agreement than from remaining in disagreement. Why then do they enter the negotiation process in the first place? The answer is simply that they must go through the negotiation process so as to sustain their BATNA; failing to negotiate could endanger their eventual achievements.<sup>52</sup>

Under a False-Negotiations model, the incentives of the parties can change dramatically. Rather than represent an option for joint gains, the negotiation becomes a way for one party to extract gains from the other party without any incentive to enter into a final agreement:

[I]n order to be successful, false negotiators need to strike a balance between two opposing goals: avoiding an agreement that would endanger their BATNA and maintaining the negotiations so as to preserve their BATNA. This balancing act entails the concurrent use of *competitive and cooperative tactics*. Successful false negotiators use contentious tactics to stall the

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51. Edy Glzman et al., *False Negotiations: The Art and Science of Not Reaching an Agreement*, 59 J. CONFLICT RESOL. 671, 672 (2015).

52. *Id.* at 673 (emphasis in original) (citation omitted).

negotiations and avoid an unwanted agreement, yet they are also expected to be careful not to use tactics that would appear unacceptable to the other party and would increase the risk of break off and condemnation by the other party. In the interest of keeping the negotiations alive, false negotiators may also make cooperative moves and gestures of good will, signaling their cooperative intentions to the other party, until a point is reached where their desired goals seem feasible and their BATNA seems achievable.<sup>53</sup>

Perhaps the most intuitively familiar example of False Negotiations arises in the employee compensation context. For example, assume a tenured professor is an employee of Small University and has achieved the highest rank with the highest level of salary available to employees of Small University. Small University has a policy that it will only consider salary increases beyond this level if necessary to match a competing external offer from another peer university. Thus, if the professor wants to receive a pay raise, the only possible option would be to enter into active negotiations with another university for a higher-paid position.

To try to achieve a higher salary at Small University, the professor applies to interview for an equivalent position at Large University (a peer institution) that would pay twenty percent more than Small University. After the interview, the professor asks Small University to match the twenty percent pay raise, but Small University declines the request on the basis that an interview does not count as an offer for these purposes. In response, the professor decides to continue to meet with Large University about the new position. Large University sees this as a sign of enthusiasm and thus votes to make a formal offer of the position to the professor. Under Large University policy, the offer does not become final and binding until approved by the Board of Trustees. The professor returns again to ask Small University to match the higher salary, but again, Small University decides not to match on the theory that it is not an official offer until the Board approves. So, the professor returns to Large University this time requesting an expedited Board approval process, which Large University takes to mean an almost-certain likelihood the offer will be

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53. *Id.* at 674 (emphasis in original).

accepted once approved by the Board. As soon as the Board approves the offer, however, Small University matches and the professor stays at Small University.

Recast in terms of negotiation theory (and False Negotiation theory in particular) the example can be broken down as follows: (1) the professor and Large University are the negotiating parties, (2) a successfully negotiated agreement would involve Large University hiring the professor, (3) one of the professor's BATNA would be keeping the job at Small University but at a higher salary, (4) the professor's other BATNA would be keeping the job at Small University at same salary. The BATNA remains an available option only as long as active negotiations remain ongoing between the professor and Large University because Small University will only pay a higher salary if it is possible that the professor could receive a competing offer from Large University. The other BATNA, however, can be imposed on the professor unilaterally by Large University simply by deciding to stop pursuing or negotiating an offer. For this reason, the professor has a strong incentive to convince Large University of enough sincere interest to keep active negotiations ongoing. At the same time, it is impossible for a Large University offer to be more attractive to the professor than the BATNA because Small University will match salary and the professor otherwise prefers Small University.

Under False Negotiations, one party (insincere) continues to create value for themselves as long as the negotiations remain ongoing. The other party (sincere) believes they would share in the value created during the negotiations as part of a final negotiated agreement but will never do so because the insincere party's BATNA will always be better than a negotiated agreement. The ultimate goal of the insincere party, therefore, is to ensure enough progress is achieved to justify keeping the negotiations open but not so much progress that it effectively results in a final negotiated agreement. It is possible that parties can enter into negotiations as insincere from the start and never have any intention of reaching a final agreement, but it is also possible for parties to begin as sincere and then during the Value Creation Stage learn enough information to switch to insincere. Thus, it is often difficult, if not impossible, for sincere parties to identify insincere parties before or during negotiations, and so sincere parties often cannot exclude insincere ones from a negotiation. Intuitively, the problem only

becomes exacerbated as the number of parties increases; in other words, the more parties involved, the harder it becomes to identify any one of them as insincere. In turn, this changes both the dynamic caused by insincere parties on the negotiations as well as the potential responses. The next section will consider these additional complexities.

### 3. False Negotiations in a Multilateral Setting

In some ways, multiparty and international negotiations can be thought of as merely an extension of the two-party negotiation models above, but in other ways, the real-world experience with multiparty and international negotiations have proven more complex and differ in enough ways that a different analytical model has been developed to analyze them.<sup>54</sup> Perhaps the most intuitive result to emerge from complex negotiation theory as applied to multiparty and international negotiations is that adding parties and issues to a negotiation increases the complexity and thus increases the chances that the parties will not be able to achieve a negotiated outcome.<sup>55</sup>

Unlike the two-party model, however, there is less consensus in the literature as to the specifics of how multiparty negotiations are structured and thus less certainty as to the expected strategic interactions among the parties. For example, under one model, multiparty negotiations can be divided into five stages distinct from two-party negotiations: (1) identification of negotiation architecture, (2) context analysis, (3) process analysis, (4) structural and relational analysis, and (5) decisional analysis.<sup>56</sup> In effect, the presence of multiple parties creates opportunities for factions and strategic alliances among a subset of parties that could prejudice the interests of

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54. See generally BRIGID STARKEY ET AL., *NEGOTIATING A COMPLEX WORLD: AN INTRODUCTION TO INTERNATIONAL NEGOTIATION* (2d ed. 2005).

55. Barbara Gray & Dana R. Clyman, *Difficulties Fostering Cooperative Agreements in Multiparty Negotiations: Cognitive, Procedural, Structural, and Social*, in *INTERNATIONAL HANDBOOK OF ORGANIZATIONAL TEAMWORK AND COOPERATIVE WORKING* 401, 401–03 (2008). See Hong Zhang et al., *Negotiation Complexity: A Review and an Integrative Model*, 32 *INT'L J. CONFLICT MGMT.* 554 (2021), and Barbara Gray, *The Complexity of Multiparty Negotiations: Wading into the Muck*, 4 *NEGOT. & CONFLICT MGMT. RSCH.* 169 (2011) for further discussion on how multiple parties increases the complexity of negotiations.

56. Crump, *supra* note 27, at 138–49.

the other parties, which requires the addition of certain structural and procedural safeguards to provide sufficient comfort for all parties to be willing to enter the negotiation in the first place.

On the other hand, a different model approaches multiparty negotiations as retaining value creation and value claiming stages from two-party negotiations but analyzes them within a spatial model rather than a linear model.<sup>57</sup> Under this approach, the value creation and value claiming stages “will be interwoven as negotiators work towards agreement and will reflect the transitions necessary for settlement. . . . [I]t is likely that groups will use all available strategies in order to both cooperate and compete rather [than] any one strategy.”<sup>58</sup> From this perspective, the “stages” transform into “episodes” which usually repeat over the course of the negotiations. In other words, “[t]he critical feature of episodic models is cycles. These models presume that most negotiators cycle through phases in relatively short runs of a given strategy. . . . This means that negotiators can make a variety of transitions.”<sup>59</sup>

In the absence of a dominant analytical framework to analyze multiparty negotiations, the literature has focused more on factual or empirical studies of specific, real-world negotiations to identify patterns or factors that tend to correlate with successfully concluded multiparty negotiations and in particular those conducted through organizations such as the World Trade Organization (“WTO”) or the OECD.<sup>60</sup> Unfortunately, no clear explanatory principle has emerged from these studies to explain why some negotiations, such as the creation of the WTO to reinforce the reduction in tariffs and other barriers to trade, have proven so successful while others, such as the failed negotiations over a multilateral investment institution, have proven less so.<sup>61</sup> Among some of the potential explanations is the

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57. See Mara Olekalns et al., *Phases, Transitions and Interruptions: Modeling Processes in Multi-Party Negotiations*, 14 INT’L J. CONFLICT MGMT. 191, 194 (2003).

58. *Id.* at 194.

59. *Id.* at 196.

60. See, e.g., Kyle Bagwell et al., *Quantitative Analysis of Multiparty Tariff Negotiations*, 89 ECONOMETRICA 1595, 1595–96 (2021); David Metcalfe, *The OECD Agreement to Criminalize Bribery: A Negotiation Analytic Perspective*, 5 INT’L NEGOT. 129 (2000).

61. See Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT’L L.J. 467, 473 (1998). (discussing how issues such as international

theory that composition of the institutions involved could directly affect the perceived fairness and justice (or lack thereof) of the negotiation process itself.<sup>62</sup>

Fortunately, for purposes of this article, one relevant lesson that does emerge from the literature analyzing complex multiparty negotiations is that such negotiations do not necessarily progress in a linear fashion.<sup>63</sup> Correspondingly, no single achievement on its own during active negotiations necessarily indicates positive progress towards achieving a final negotiated settlement in the same way as in the two-party context and may in fact indicate the exact opposite.<sup>64</sup>

Similarly, an analysis of a multiparty negotiation cannot necessarily rely on several of the relatively strong assumptions that do apply in the two-party context; in particular, it is no longer necessarily a correct assumption in a multiparty negotiation that achieving milestones over the course of active negotiations unambiguously indicates a greater likelihood of the parties reaching a final negotiated agreement. Relaxing this assumption requires only a plausible theoretical framework under which achieving milestones during negotiations does not necessarily evidence an increased likelihood of

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investment too closely implicate core political issues within various countries making it difficult to justify such treaties as merely technocratic and technical in nature in the same way that treaties over tariffs or currency markets could be). *See also* Martin Dauton, *From Bretton Woods to Havana: Multilateral Deadlocks in Historical Perspective*, in *DEADLOCKS IN MULTILATERAL NEGOTIATIONS: CAUSES AND SOLUTIONS* 47-78 (Amrita Narlikar ed., 2010) (discussing Foreign Direct Investment as a core development strategy of many less developed countries which is fundamentally inconsistent with a treaty proposing rules to prevent distortion of multilateral investment markets). *See* Jean-Frédéric Morin & Gilbert Gagné, *What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?*, 36 *INT'L J. POL. ECON.* 53 (2007), for a discussion on the “lateralism paradox” in trade and investment law.

62. John S. Odell, *Introduction to NEGOTIATION TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 2, 2 (John S. Odell ed., 2006) (“[t]he content of developing countries’ international trade agreements varies with the process of negotiation that produces them, and in turn that process depends partly on the institutions in which the process unfolds.”).

63. *See* Crump, *supra* note 27, at 141 (discussing the role of multiple process and decisional theories in the complex multiparty negotiation.).

64. *See* BRIGID STARKEY ET AL., *INTERNATIONAL NEGOTIATIONS IN A COMPLEX WORLD* 51–52 (Deborah Gerner, et al. eds., 4th ed. 2015) (discussing how increasing the number of actors and issues in a negotiation increases the number of possible outcomes).

achieving a final agreement. The False Negotiation model provides one such framework, where the greater the number of milestones achieved during active negotiations, the more likely at least one of the parties is insincere in their negotiations making a final agreement less likely not more. With respect to BEPS at least, there seems to be little in the academic literature considering such an alternative.<sup>65</sup> This article will do so.

### III. THE BEPS PROJECT AND MULTILATERAL NEGOTIATION THEORY

#### A. *A Brief History of OECD Anti-Tax Haven Efforts*

The history of BEPS contains a remarkable number of successes and achievements, but at the same time also has faced repeated hurdles, backslides, and reboots.<sup>66</sup> Chart A contains a timeline of certain selected significant events that occurred during the OECD Harmful Tax Competition project,<sup>67</sup> while Chart B contains a timeline of certain

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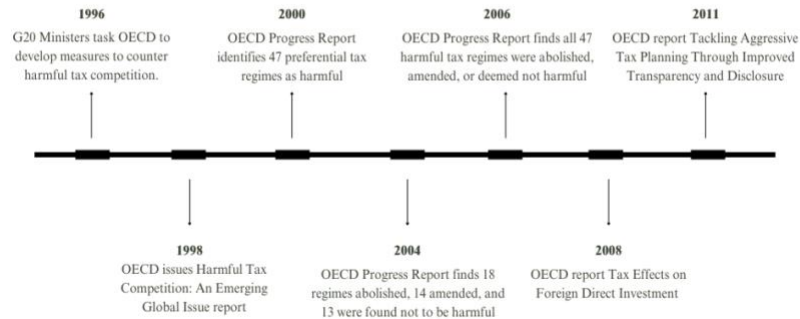
65. Cf. Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS*, 10 ERASMUS L. REV. 3, 3–5 (2017) (evaluating BEPS through the lens of tax theory and law and not through negotiation theory).

66. See generally Robert T. Kudrle, *The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib*, 8 GLOB. ECON. J. 1 (2008); Robert T. Kudrle, *The OECD and the International Tax Regime: Persistence Pays Off*, 16 J. COMPAR. POL'Y ANALYSIS: RSCH. & PRAC. 201 (2014) (discussing the OECD's efforts to combat international tax evasion); Javier Garcia-Bernardo et al., *Did the Tax Cuts and Jobs Act Reduce Profit Shifting by U.S. Multinational Companies?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30086, 2022), [https://www.nber.org/system/files/working\\_papers/w30086/w30086.pdf](https://www.nber.org/system/files/working_papers/w30086/w30086.pdf) (analyzing the impact of the 2017 Tax Cut and Jobs Act); EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* (2019) (discussing the causes and implications of historically low tax rates for the ultra-wealthy).

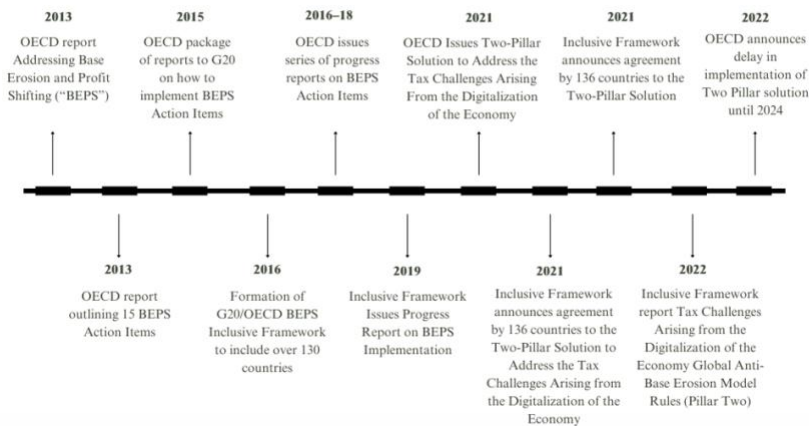
67. See OECD, *HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE* (1998), <https://www.oecd.org/ctp/harmful/1904176.pdf>, and OECD, *and THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES* (2006), <https://www.oecd.org/ctp/harmful/37446434.pdf>, for details of the events identified in Chart A.

selected significant events and achievements during the OECD BEPS Project.<sup>68</sup>

**Chart A:  
Harmful Tax Competition Timeline of Selected Events**



**Chart B:  
Timeline of Selected BEPS Events**



As both timelines reflect, the history of the OECD efforts to combat harmful tax practices has been defined by both several notable

68. See *BEPS Reports*, OECD, <https://www.oecd.org/tax/beps-reports.htm> (last visited Dec. 9, 2023) to access OECD reports detailing the events identified in Chart B.



and historic achievements and also repeated setbacks and delays.<sup>69</sup> For example, the OECD concluded that it had been successful in fully implementing its Harmful Tax Competition project while, at the same time, the proliferation of tax havens increased during the same period.<sup>70</sup> Put differently, “[i]n a war waged primarily from 1998 through 2002, 35 tax havens—including some of the world’s smallest countries—beat back an attack on their offshore business led by the OECD, the protector of the collective economic interest of 30 of the world’s biggest countries.”<sup>71</sup>

The end of the Harmful Tax Competition project eventually sowed the seeds for the creation of the Base Erosion and Profit Shifting, i.e., BEPS, project. The BEPS project officially began after a call by the G-20 in November 2012 for the OECD to issue a report on base erosion and profit shifting, which the OECD issued in February 2013.<sup>72</sup> This initial report rejected a case-by-case approach to these issues and instead called for a comprehensive package of measures to be pursued collectively.<sup>73</sup> The OECD followed up this initial call with another report in July 2013 outlining an Action Plan, which identified fifteen separate Action Items ranging from how to address specific types of transactions such as “hybrid mismatch” transactions to coordinating tax return information among countries using country-by-country reporting to creating a novel “multilateral instrument” to address unanticipated challenges.<sup>74</sup> Each Action Item was reported to its own specialized committee to develop and propose solutions that would be

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69. See, e.g., Lilian V. Faulhaber, *Diverse Interests and International Legitimation: Public Choice Theory and the Politics of International Tax*, 114 AM. J. INT’L L. 265, 266–69 (2020); Reuven S. Avi-Yonah, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, 34 BROOK. J. INT’L L. 783, 788–92 (2008).

70. See J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 8–11 (Peter J. Katzenstein ed., 2006).

71. Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, TAX NOTES, July 30, 2007, at 327.

72. OECD, ADDRESSING BASE EROSION AND PROFIT SHIFTING 14 (2013), [https://read.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting\\_9789264192744-en#page2](https://read.oecd-ilibrary.org/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page2)

73. See *id.* at 8–9.

74. OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 14–26 (2013), [https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting\\_9789264202719-en#page1](https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en#page1).

acceptable to the countries involved, with work on each Action Item to be done concurrently in the hopes of creating a comprehensive set of responses once all the Action Items were completed.

Perhaps one of the more publicized examples of the unique history of the BEPS project involves Action Item One, which called for developing new methods to address the challenges of digital taxation.<sup>75</sup> Under the 2015 Action Plan this was considered a single issue addressing how to identify the proper jurisdiction of digital companies that may do business globally, but which have little to no physical presence in most countries.<sup>76</sup> By 2019, however, negotiations over digital taxation began to fracture into two distinct but related concepts: taxing digital companies without physical presence in a country and implementing a global minimum tax for corporations as a protective backstop to digital taxation, which ultimately led to the publication a Policy Note in January 2019 calling for the creation of a “two pillar” approach—Pillar 1 being digital taxation and Pillar 2 being the Global Minimum Tax—to be pursued concurrently under Action Item One.<sup>77</sup> This change ultimately has come to be referred to as “BEPS 2.0” as it represented a second attempt to develop a comprehensive approach to Action Item One that was acceptable to all parties.<sup>78</sup>

The rise of tax havens and profit shifting fundamentally challenged the effectiveness of the bilateral tax treaty web. In particular, the United States became increasingly concerned about the rise of so-called “treaty shopping” by taxpayers residing in non-treaty countries setting up shell corporations in a treaty jurisdiction.<sup>79</sup> In response, the United States developed the “limitations of benefits” (“LOB”) rule which denied treaty benefits to shell corporations for which the beneficial owners would not otherwise be eligible for treaty

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75. *Id.* at 14–15.

76. *See* OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 14–15 (2015), [https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting\\_9789264202719-en#page1](https://read.oecd-ilibrary.org/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en#page1).

77. *See* OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITALISATION OF THE ECONOMY — POLICY NOTE (2019), <https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf>.

78. Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and the United States*, 114 *AJIL UNBOUND* 255, 258–59 (2020).

79. Mark Stone, *LOB Provisions in the 2015 Draft U.S. Model Tax Treaty*, 80 *TAX NOTES INT’L* 625, 625–27 (2015).

benefits.<sup>80</sup> The problem with this approach, however, was that treaty benefits were embodied in the over one hundred separate bilateral tax treaties to which the United States was a party, meaning merely adding the provision to the model treaty would not be sufficient; rather, each treaty would need to be renegotiated by the United States with the applicable counterparty to agree to an amendment; then, to implement a LOB provision, the U.S. Senate would have to formally approve the treaty amendment. While this may sound daunting, beginning in 1981 the United States in fact began this process by drafting a model protocol to amend all the then-existing U.S. tax treaties on a case-by-case basis, negotiating the specific details of the protocol with each counterparty state.<sup>81</sup> While it took a couple of decades, the United States was eventually able to complete this process for all of its outstanding tax treaties by either adopting a LOB amendment protocol or an updated version of the entire treaty.<sup>82</sup> By that time, however, newer and more complex forms of treaty shopping and other perceived treaty abuses had been developed to avoid the restrictions of the LOB rules.

In part due to the U.S. experience with the LOB provision, calls to adopt less formal and easier to update legal instruments began to emerge among scholars and policymakers.<sup>83</sup> In particular, two novel and more flexible instruments emerged. The first was so-called “Inter-Governmental Agreements” (“IGA”) developed by the U.S. Department of Treasury as part of implementing the then recently enacted Foreign Account Tax Compliance Act of 2010 (“FATCA”). IGAs are not treaties;<sup>84</sup> rather, they represent a form of unilateral executive agreement between the Treasury Department and the appropriate counterparties in other countries. Pursuant to IGAs, the foreign agency agrees to implement certain procedures to collect and share financial information with the United States, and in exchange, the

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80. See William P. Streng, “Treaty Shopping”: Tax Treaty “Limitation of Benefits” Issues, 15 HOUS. J. INT’L L. 1, 12–13 (1992).

81. See Reuven S. Avi-Yonah, *Who Invented the Single Tax Principle?: An Essay on the History of U.S. Treaty Policy*, 59 N.Y.L. SCH. L. REV. 305, 312–15 (2015).

82. *Id.* at 312 n.50.

83. See, e.g., Richard L. Reinhold, *What Is Tax Treaty Abuse? (Is Treaty Shopping an Outdated Concept?)*, 53 TAX LAW. 663, 664–65 (2000).

84. Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters)*, 69 TAX NOTES INT’L 565, 565 (2013).

Treasury Department agrees not to enforce the most onerous provisions of FATCA against financial institutions based in that jurisdiction.<sup>85</sup>

As unilateral executive agreements, IGAs were able to be adopted and implemented very quickly, in stark contrast to the LOB protocols of a generation earlier. In fact, to the extent the IGAs had a constraining effect on behavior at all, it would be more as a form of “soft law” in the international context precisely because they did rise to the level of formal international law. IGAs could be thought of as applying and being in force worldwide the moment the United States publicly announced their existence, which stands in even more stark contrast to LOB protocols, which as formal treaty amendments were not in effect and binding with respect to any one country until formally approved as treaty amendments.

### *B. BEPS and the Rise of the “Multilateral Instrument”*

Perhaps one of the most relevant examples of this phenomenon within the current BEPS negotiations involves the so-called “Multilateral Instrument” (“MLI”) proposed in BEPS Action Item Fifteen.<sup>86</sup> By way of background, since the founding of the OECD until the issuance of the initial BEPS report, the primary instrument utilized to coordinate and implement the international tax regime among states was the bilateral tax treaty. Over time, the United States, the OECD, and the UN all issued different versions of a “model” tax treaty to attempt to generate some form of consistency among bilateral tax treaties. Eventually, most if not all bilateral tax treaties began to conform to one of these three models. The result has been described as a “web” of bilateral tax treaties combined with soft-law norms which, taken together, provide the foundation for an international tax law regime.<sup>87</sup>

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85. *See id.*

86. *Action 15 Multilateral Instrument*, OECD, <https://www.oecd.org/tax/beps/beps-actions/action15/> (last visited Sept. 26, 2023).

87. Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. REV. 1603, 1610 (2016) (“[S]tates rely on a combination of mainly bilateral treaties tied together and reinforced by a web of ‘soft law’ coordination methods.”). Some legal scholars have gone further and contended that the regime rises to the level of customary international law. *See, e.g.*, Reuven S. Avi-Yonah, *Does Customary International Tax Law Exist?*, in RESEARCH HANDBOOK ON INTERNATIONAL

The MLI was proposed in BEPS Action Item Fifteen in part as a response to the difficulties in updating treaties experienced with the LOB and other similar changes, but for which there is little precedent under international law. According to the OECD, the MLI “allows governments to modify existing bilateral tax treaties in a synchronized and efficient manner to implement the tax treaty measures developed during the BEPS Project, without the need to expend resources renegotiating each treaty bilaterally.”<sup>88</sup> As explained by the former Secretary General, avoiding the need to renegotiate treaties individually, the MLI “results in more certainty and predictability for businesses, and a better functioning international tax system for the benefit of our citizens.”<sup>89</sup>

In adopting Action Item Fifteen, the OECD expressly relied and built on the extensive bilateral tax treaty network as the intellectual foundation for BEPS while at the same time conceding that it had proven to be one of the most significant impediments to implementing BEPS in an effective manner.<sup>90</sup> On one hand, the MLI by its own terms is not itself a bilateral tax treaty, and its adoption was not intended to repeal, replace, or amend through protocol any of the existing bilateral tax treaties currently in effect. On the other hand, the only way the MLI could effectively work as a tool to implement and synchronize BEPS proposals across all member states would be if its provisions applied in priority over bilateral tax treaties.

The OECD attempted to walk a delicate balance between these potentially competing goals of the MLI through a two-step process. First, once the draft was finalized the participating states would formally approve and adopt the MLI to which they now become

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TAXATION 2, 2–9 (Yariv Brauner ed., 2020); Reuven S. Avi-Yonah, *International Tax as International Law*, 57 TAX L. REV. 483, 496–501 (2004).

88. OECD, *supra* note 86.

89. *Id.*

90. This concession has been recognized within the international tax regime even prior to BEPS, but most pre-BEPS proposals focused on finding ways to increase participation in the use of the mechanisms of the bilateral-tax-treaty-based regime by holdout states, which differs substantially from the MLI approach of imposing a global implementation mechanism on top of the bilateral tax treaty. See Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty*, 2012 WIS. L. REV. 717, 741–42, 766–67 (2012); see also Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty Revisited*, 41 BROOK. J. INT’L L. 1229, 1231 (2015).

“signatory states” per the MLI itself.<sup>91</sup> Second, all current and future signatory states would be required to take whatever steps necessary under their domestic law for the MLI to be legally considered ratified or approved or otherwise adopted by that state.<sup>92</sup> Under Article 34 of the MLI, it would “enter into force” three months after the date at least five signatory states had formally ratified or adopted it.<sup>93</sup> And under Article 35 of the MLI, its provisions were to become operative and binding on all signatory states once the treaty “entered into force.”<sup>94</sup>

Under the terms of the MLI Convention, all signatory states are bound by the substantive provisions of the Convention once it enters into force regardless of if they have yet ratified or approved it under their domestic laws.<sup>95</sup> Such countries will then face a difficult situation: procedurally both the MLI and the bilateral tax treaties will be in force and binding law within the state, but substantively, almost every provision of the MLI is intended to change what were perceived as problematic tax treaty rules. The OECD takes the position that as two co-equal sources of law under the Vienna Convention the so-called “later in time” rule applies, meaning the provisions of the Convention will control when they conflict with a bilateral tax treaty.<sup>96</sup> Taken together, the net effect under the OECD theory is that the MLI Convention either *formally* or *effectively* displaces certain provisions across virtually every bilateral tax treaty in the world on a single day.<sup>97</sup>

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91. See Ana Paula Dourado, *Are We Compatible?: On Multilateral Tax Coordination*, 46 *INTERTAX* 3, 3–4 (2018).

92. See *id.* at 4–5.

93. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting art. 34, Nov. 24, 2016, <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>.

94. *Id.* art 35.

95. See *id.*

96. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI): Interpretation and Implementation Questions*, OECD (May 3, 2021), <https://www.oecd.org/tax/treaties/beps-mli-cop-opinion-interpretation-and-implementation-questions.pdf>. See also Nicolas M. Traut, *Tax Treaty Overrides and Friendliness Towards International Law: A Comparative Approach to Put the Later-in-Time-Rule to the Test*, 48 *CAP. U. L. REV.* 403, 404, 444 (2020).

97. See Rebecca M. Kysar, *Unraveling the Tax Treaty*, 104 *MINN. L. REV.* 1755, 1825–32 (2020) (discussing the interaction between bilateral treaties and the MLI Convention).

Yet that alone is still not the end of the story because under U.S. law many of the technical provisions of the MLI Convention may not be applicable to U.S. taxpayers domestically if the MLI Convention was considered to be “non-self-executing” under U.S. law, meaning some form of legislative action would be necessary for the rules to apply domestically.<sup>98</sup> This could lead to a situation where the United States agrees with the OECD that the MLI constitutes binding *international* law and yet at the same time be unable to enforce or potentially even introduce the provisions of the MLI *domestically* in U.S. courts.<sup>99</sup> Stated more generally, treaties that are considered “non-self-executing” under U.S. law (which are the majority of treaties) are considered valid international law but at the same time may not be enforceable or perhaps even admissible in domestic U.S. courts.<sup>100</sup>

Taken together, these unsettled legal questions create the potential for dozens if not hundreds of tiny hairline fractures to permeate throughout the post-BEPS-international-tax regime as the

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98. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 540 (2008).

99. See Diane Ring, *When International Tax Agreements Fail at Home: A U.S. Example*, 41 BROOK. J. INT’L L. 1185, 1195, 1225 (2015).

100. While this may seem like a strange result to many, it was the rule adopted by the U.S. Supreme Court in the case of *Medellin v. Texas*. 552 U.S. 491 (2008). In *Medellin*, a valid treaty that was in force and binding on the United States provided one immigration rule while the U.S. Congress had enacted a different, conflicting rule under domestic law. *Id.* at 497–98. The Supreme Court concluded that because the treaty was non-self-executing the substantive rule under the treaty could not be introduced as binding precedent within the U.S. courts as it had no effect absent Congressional execution of the treaty. *Id.* at 525. See also Curtis A. Bradley, *Self-Execution and Treaty Duality*. 2008 SUP. CT. REV. 131, 182. According to a recent UN study of treaty law, under the Vienna Convention on the Interpretation of Treaties only principles of international law that are considered “jus cogens” or “peremptory” are incapable of being repealed by a signatory state to a treaty. Int’l. Law Comm’n, Rep. on the Work of its Seventy-First Session, Chapter V: Peremptory Norms of General International Law (jus cogens), U.N. Doc. A/74/10, at 162 (2019). According to the U.N., a norm is peremptory if: (a) it is a norm of general international law; and (b) it is accepted and recognized by the international community of States as a whole as a peremptory norm which can only be modified by a subsequent peremptory norm. *Id.* at 142–43. While the MLI might satisfy (a), assuming it receives unanimous support from the Inclusive Framework, as a newly created set of rules of first impression arising from international negotiations, it would be difficult if not impossible to satisfy (b).

effectiveness of the novel MLI begins to be scrutinized in their enforcement on a case-by-case basis. If history is any guide, multinational taxpayers will not only continue to challenge the new provisions of the MLI, both through its structured transactions and in litigation, but once even the smallest cracks emerge in the system multinational taxpayers and their cohort of sophisticated tax advisors will continue to put pressure on them until at least one such crack opens into a major fault line, which once again could threaten the integrity of the international tax regime.<sup>101</sup>

Perhaps more relevant to the remainder of BEPS, however, the MLI experience could be perceived as significant expansion of power of the OECD and its member states to pressure non-member states to engage in negotiations over the remainder of BEPS.<sup>102</sup> From this perspective, the experience with the MLI could be perceived as another example of the OECD and its member states pressuring the non-OECD member states by creating another potential avenue for them to impose rules without their meaningful participation.<sup>103</sup> The role this risk can play in creating unforeseen consequences to the overall negotiations itself will be considered in the next section.

#### IV. BEPS AS FALSE NEGOTIATIONS

In terms of negotiation theory, the BEPS negotiations appear to be facing difficulty in the transition from the “active” negotiation stage to the “endgame” stage. It therefore makes sense to focus on that transition point to try to identify the key differences between them and determine which of those may be preventing the transition from

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101. See generally Yariv Brauner, *McBEPS: The MLI – The First Multilateral Tax Treaty That Has Never Been*, 46 *INTERTAX* 1 (2018) (discussing the MLI as preserving the conservative evolution of the international tax regime).

102. See, e.g., Andrea Laura Riccardi Sacchi, *MLI Implementation and Impact from the Latin American Perspective*, in 80 *SERIES ON INTERNATIONAL TAXATION, A MULTILATERAL CONVENTION FOR TAX: FROM THEORY TO IMPLEMENTATION* 167 (Sergio André Rocha & Allison Christians eds., 2021) (surveying the implementation of BEPS by Latin American countries, most of which had no role in the formation of BEPS and are not members of the Inclusive Framework).

103. Cf. Yariv Brauner, *Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument*, 25 *FLA. TAX REV.* 489, 520–23 (2022) (identifying preliminary studies that found a lack of inclusion of non-OECD member states across various BEPS projects).



occurring. From this perspective, the primary difference between the two stages is the loss of one strategic option. During active negotiations, the parties have three strategic options—(1) agree to a ZOPA proposal, (2) reject all ZOPA options in favor of the BATNA, or (3) continue negotiating—while in the endgame the parties no longer have option 3 and are left to choose between Options 1 and 2. Typically, Option 3 ceases to be available, and thus negotiations enter the endgame either when the best possible agreement has been identified from within the ZOPA or no such agreement can be identified and the negotiations are at an impasse. In other words, the endgame begins at the point where any further active negotiation cannot change the ultimate payoffs at all and thus only a negotiated deal or the BATNA remains. Because the BEPS negotiations in general at least appear to fail to transition from active negotiations to endgame, it follows that for at least some of the parties involved continuing negotiations remains a viable option. Thus, to achieve a transition to the endgame, those parties must be identified and, if at all possible, Option 3 removed as a viable option.

As a general matter, to the extent a negotiation is stuck in this state of perpetual negotiations for these reasons, one of the most effective ways to remove Option 3 for a party is either by increasing the payoff of the negotiated agreement or the BATNA or both. In other words, what may seem counterintuitive to many is that the best way to achieve a successful *negotiated* outcome in the face of False Negotiations could be to increase the appeal of a *non-negotiated* outcome. The ultimate goal of making the non-negotiated outcome more appealing is not to increase the chances of failed negotiations but rather to create the conditions necessary for the negotiations to enter the endgame, where a successful negotiated outcome can truly be possible.

With regards to the Global Minimum Tax portion of the BEPS negotiations in particular, this analysis could well help overcome the sticking points that seem to repeatedly reemerge throughout the Harmful Tax Competition and BEPS processes and transition to a real and effective endgame. Under this model, however, the only way to do so would be for all parties not only to accept but embrace the legitimacy of BATNAs and respect the decision of any party who

ultimately chooses their BATNA.<sup>104</sup> Admittedly, doing so increases the possibility that negotiations may ultimately fail and no agreement will be reached, but that is the entire point of a negotiated deal in the first place. From this perspective, the proponents of a worldwide deal on a Global Minimum Tax must choose between the certainty of a never-ending negotiations cycle over a finalized deal or embrace negotiations with a realistic chance of successfully negotiating a deal but also some risk that the deal may fail. In other words, a negotiation process without a real BATNA is not a true negotiation,<sup>105</sup> and thus a negotiated agreement outcome is simply not possible.

#### *A. The Stages of the BEPS*

Very broadly speaking, the OECD experience with the Global Minimum Tax can be analyzed within the negotiation process stages paradigm.<sup>106</sup> While it might be possible to refer to the emergence of the initial Harmful Tax Competition project in 1995 as the initial stage, as a formal matter the Global Minimum Tax proposal emerged as part of the negotiations over BEPS Action Item One, so the analysis should begin with the publishing of the BEPS Action Item report. Assuming this is correct, the BEPS Report formally started the Preliminary Stage in which parties begin to stake their initial positions, identify their ZOPA and BATNA, and develop initial strategic choices including who should make the first offer. The Information Stage is marked by the beginning of work on implementing Action Item I and ultimately the development of the Two Pillar proposal (including the Global Minimum Tax). The reason these are in the Information Stage is because every part of the process is focused on “value creation” by the parties working together to identify joint surplus. The Information Stage concluded at the 2021 agreement of global consensus.

Once the parties have exhausted the opportunities for joint value creation, the negotiation transitions into the Distribution or Value Claiming Stage in which the parties shift the focus from how to create value to how to divide value amongst themselves. The transition

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104. See Allison Christians, *Getting to Yes? Thoughts on a BATNA for International Tax*, 2013 WIS. L. REV. ONLINE 7, 11 (2013).

105. See CADDYSHACK (Orion Pictures 1980) (“A flute with no hole is not a flute. A donut with no hole is a Danish.”).

106. See *supra* Part III (discussing the OECD efforts to address harmful tax avoidance in the international context).

occurs when the incentives of the parties change from one of pursuing a common interest in maximizing value creation to a form of zero-sum game with each party wanting to claim as much of the value as possible. It is within the Distributive Stage that the parties expand their focus and begin to compare the benefits of any actual negotiated agreement within the ZOPA to the value of their BATNA.

The Distribution or Value Claiming Stage continues in this manner until all realistic potential negotiated agreements in the ZOPA are identified and their value is compared to the BATNA. In stark contrast to both the Value Creation and Value Claiming Stages, which tend to be more open-ended, once the parties have fully exhausted the options under the Distribution Stage, all that remains for each party is a single decision—to accept a negotiated agreement or to choose their BATNA. This is the transition point to the Closing Stage/Endgame where each party chooses the option that provides the higher payoff, and the negotiation ends as there is no benefit left to either party to delay a final decision. Defined this way, identifying the transition point to the Endgame may be possible in hindsight of a completed negotiation but proves much more difficult to do so in real time. Such error may have happened recently in the context of the Global Minimum Tax issue where in the moment there seemed to be genuine enthusiasm for a final negotiated deal emerging because the parties had recently announced a near-universal consensus on the matter. In hindsight, this enthusiasm may have been premature. Why the difference?

### *B. BEPS as False Negotiations*

The negotiations puzzle described above can be resolved if the BEPS negotiations are reconceptualized as False Negotiations. For these purposes, assume (broadly speaking) that there are three “types” of countries involved in BEPS: (1) countries who enter the negotiations fully committed to a particular final negotiated agreement, (2) countries committed to achieving a final negotiated agreement but uncertain about the details, and (3) countries opposed to any final negotiated outcome. For the most part, the literature has been assuming (often an unstated assumption) that the members of the Inclusive Framework are participating in the process in good faith with an eye toward achieving a final agreement or, in other words, that they are comprised of Groups

1 and 2 with sincere options available for supporting a final agreement. Group 1 countries could be thought of as countries like the United States, the EU, and Japan which have some of the largest and most sophisticated economies in the world and thus risk losing the most tax revenue from base erosion due to highly mobile tax bases such as digital services and intellectual property. Group 2 countries could be thought of as countries such as China and India which are large emerging economies but not yet fully developed at least in terms of per-capita GDP. Group 2 countries could potentially be interested in a final agreement as a means to join Group 1 countries in terms of development but at the same time have concerns that any BEPS agreement could be used at least in part by Group 1 countries to maintain their current economic dominance at the expense of Group 2 countries.

Group 3 countries could be thought to fall broadly into two categories: (1) countries that have or continue to benefit from tax competition such as Ireland, Luxembourg, and the Cayman Islands and (2) developed countries on the lower end of the per-capita-income spectrum, such as Nigeria, Kenya, or Hungary, who are pursuing higher economic growth and do not want any agreement to foreclose such opportunities. It might be relatively easy to understand why such countries might oppose a final agreement contrary to their interests, but the harder question is why such countries would enter into negotiations at all. For these purposes, the most reasonable assumption would be that Group 3 countries would join negotiations in response to pressure in the form of current or potential future retaliation from Group 1 countries. This is more than mere speculation. For example, in July 2021 Ireland announced it would not join the Global Minimum Tax proposal but then reportedly under pressure from the United States in October 2021 announced it would join the agreement albeit with several concerns.<sup>107</sup> Similarly, when the EU member states voted in July 2022 to decide whether to join the Global Minimum Tax proposal, all member states endorsed the proposal except Hungary.<sup>108</sup> Shortly

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107. Padraic Halpin & Conor Humphries, *Ireland Agrees to Global Tax Deal, Sacrificing Prized Low Rate*, REUTERS (Oct. 7, 2021, 4:46 PM), <https://www.reuters.com/business/ireland-backs-global-tax-deal-gives-up-prized-125-rate-2021-10-07/>.

108. *See Five Big EU States to Implement Minimum Corporate Tax if No EU Deal*, REUTERS (Sept. 9, 2022, 9:45 AM),

afterwards, the United States surprisingly announced that it would withdraw from the existing tax treaty with Hungary.<sup>109</sup> According to a November 2022 letter from the ranking members of three Congressional committees to the Secretary of Treasury, the termination of the treaty “was a transparent act of retaliation for Hungary’s opposition to the [OECD] agreement.”<sup>110</sup> Shortly after in December 2022, with little explanation, the European Union announced that Hungary had dropped its opposition to the OECD proposal.<sup>111</sup> From this perspective, it is less surprising that Group 3 countries would agree to engage in BEPS negotiations and ultimately support the proposals necessary to avoid punishment; at the same time, however, the initial incentives that led to such countries opposing an agreement in the first place remain, which would result in efforts to oppose or delay implementation of any final negotiated agreement.<sup>112</sup>

Taken together, a counter-intuitive result emerges with respect to any negotiation process comprised of all three groups of countries—the more Group 1 countries effectively pressure Group 3 countries to engage in active negotiations, the less likely any ultimate successful negotiated agreement could ultimately result. In effect, Group 1 countries cannot afford for negotiations to end without a final agreement while Group 3 countries cannot afford for negotiations to

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<https://www.reuters.com/markets/europe/five-big-eu-states-implement-minimum-corporate-tax-if-no-eu-deal-2022-09-09/>.

109. Press Release, U.S. Dep’t of the Treasury, United States’ Notification of Termination of 1979 Tax Convention with Hungary, (July 15, 2022), <https://home.treasury.gov/news/press-releases/jy0872>.

110. Letter from Mike Crapo, Ranking Member, S. Fin. Comm.; James E. Risch, Ranking Member, S. Foreign Rels. Comm.; & Kevin Brady, Ranking Member, H.R. Ways and Means Comm., to Secretary Janet Yellen, U.S. Dep’t of the Treasury, and Secretary Antony Blinken, U.S. Dep’t of State (Nov. 3, 2022), [https://waysandmeans.house.gov/wp-content/uploads/2022/11/sfrc-sfc-wm\\_letter\\_to\\_state\\_and\\_treasury.pdf](https://waysandmeans.house.gov/wp-content/uploads/2022/11/sfrc-sfc-wm_letter_to_state_and_treasury.pdf).

111. Siqalane Taho, *EU Agrees Pillar Two Global Minimum Tax Rate*, INT’L TAX REV. (Dec. 13, 2022), <https://www.internationaltaxreview.com/article/2b0daxffslhsf7xe9n9c/eu-agrees-pillar-two-global-minimum-tax-rate>.

112. Even further, those states most opposed to reaching a final agreement could be expected to be the most openly vocal in support of the negotiations process as a means to prevent the sincere parties from withdrawing and/or suspending the active negotiations. See Martin Schweinsberg, et al., *Negotiation Impasses: Types, Causes, and Resolutions*, 48 J. MGMT. 49, 49 (2022).

end with a final agreement. The result, in many ways, could be thought of as a form of a continuous and unending loop, where once the parties are trapped, they can ultimately never reach a final conclusion absent some fundamental change to the payoff structure.<sup>113</sup> In other words, a perpetual state of negotiations.

### *C. FATCA and the BATNA*

Even if False Negotiations seem to provide at least a partial explanation for the persistent lack of a comprehensive final agreement under BEPS, at first glance False Negotiations theory might seem inconsistent with the real and legitimate intermediate successes within the BEPS Action Items. Yet when analyzed more closely, what seem like counterexamples actually can fit quite well within the False Negotiations theory. As discussed above, under this theory insincere negotiating parties have an incentive to keep active negotiations open indefinitely through the use of stalling and other deferral tactics, but not beyond the point where it would cause the sincere parties to leave the negotiations altogether.<sup>114</sup> Taken together, one would expect to observe a lengthy series of negotiations marked by unspecified delays but also punctuated by moments of seemingly major agreements along the way. Interestingly, there is at least some anecdotal evidence that not only the MLI negotiations (sometimes pointed to as one of the most successful within BEPS) but the overall pattern of BEPS<sup>115</sup> actually reflects something close to such a pattern.<sup>116</sup>

To the extent this is true, there is no reason to think it would necessarily be limited to the start of BEPS because tax competition has

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113. See Jonathan I. Lee, et al., *Wielding Power in Multiparty Negotiations: The Impact of Communication Medium and Assertiveness*, 33 INT'L J. CONFLICT MGMT. 132, 148–51 (2021)..

114. See discussion *supra* Sections II.C.1–II.C.2.

115. See Wolfgang Schön, *Is There Finally an International Tax System?* 8–9 (Max Planck Inst. for Tax L. & Pub. Fin., Working Paper No. 2021-15, 2021), <https://ssrn.com/abstract=3922687>.

116. See Dirk Broekhuijsen & Henk Vording, *The Multilateral Tax Instrument: How to Avoid a Stalemate on Distributional Issues?*, 2016 BRIT. TAX REV. 39, 61 (describing a repeated pattern of consensus and agreement over broad principles followed by disagreement and delay over implementation details); see also Reuven S. Avi-Yonah & Haiyan Xu, *A Global Treaty Override? The New OECD Multilateral Tax Instrument and Its Limits*, 39 MICH. J. INT'L L. 155, 216 (2018) (discussing limits to the implementation of MLI).

existed since well before BEPS and in fact was the impetus for the 1998 Harmful Tax Competition report in the first place. Thus, something would have had to change for Group 3 countries for them to join BEPS negotiations. In fact, what changed in the interim was the enactment of the FATCA unilaterally by the United States. Unlike all previous anti-tax competition measures, FATCA was unique in that it sought to use the economic power of the United States to extend the authority of the Internal Revenue Service extraterritorially into every other country in the world. Generally speaking, FATCA provides that any financial institution in any country must investigate its customers to determine if any of them are US persons for tax purposes and if so, report that information to the Internal Revenue Service automatically.<sup>117</sup> The penalty for noncompliance is a significant U.S. withholding tax imposed on the foreign financial institution.<sup>118</sup> Typically, it is not considered possible for one country to impose such a tax on institutions in another country, but in this case, because virtually every financial institution in the world must transact with U.S. dollars at some point, the tax could be imposed whenever that occurred.

FATCA has generally been recognized as a watershed moment and turning point in the history of international tax law, including one author referring to FATCA as “[t]he [e]nd of [i]nternational [t]ax [c]ooperation’s [f]irst [g]olden [a]ge.”<sup>119</sup> On its face, FATCA provides extremely broad powers to the IRS including the power to impose record collecting requirements on virtually all banks throughout the world and the power to impose and collect a withholding tax on the same banks for failure to comply. These rules could theoretically even apply to foreign banks which have never had any business presence in the United States and have not even taken any deposits from or otherwise worked with customers from the United States.

The remarkable extraterritorial reach of FATCA was not an unintended consequence, however, but rather a core feature of the law. Despite these wide-ranging powers, some supporters of FATCA

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117. *Foreign Account Tax Compliance Act (FATCA)*, IRS, <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> (last visited Jan. 6, 2023).

118. *Id.*

119. Steven A. Dean, *Beyond the “Made in America Tax Plan”: GILTI and International Tax Cooperation’s Next Golden Age*, 18 PITT. TAX REV. 341, 348 (2021).

contended that the intent was in fact not to exercise those powers but rather to use them to create an incentive for countries to work together cooperatively towards more effective worldwide tax information sharing procedures, to wit:

But the displeasure with the unilateral nature of FATCA, combined with the shared desire to address offshore tax evasion, has produced a multilateral dialogue. . . . We now have a very serious dialogue going on in the world, effectively about FATCA and how to have an effective multilateral system based on FATCA principles to address offshore tax evasion generally, and not just for the United States. Everyone agrees the conversation is taking place . . . . [I]t's happening and it wasn't happening before.<sup>120</sup>

. . . .  
. . . . [T]he inevitable result of FATCA is a multilateral system. Because I think even a set of bilateral intergovernmental agreements will produce disparate compliance regimes, which will then lead a few important groups—all multinational financial institutions, most emerging and developing economies, and a fair number of developed economies—to be unhappy with the nature of a fragmented bilateral compliance regime. That would then push the world to a multilateral system. And then, if it's a doomsday machine, it's the best doomsday machine ever seen.<sup>121</sup>

If FATCA could be thought of as a “doomsday machine” that is triggered only to states that refuse to engage in active negotiations, then it would make sense to not see any states refuse to engage in active negotiations after the enactment of FATCA, and even further, to do whatever possible to prevent active negotiations from failing.<sup>122</sup> In

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120. Colloquium, *Conceptualizing a New Institutional Framework for International Taxation*, 44 WASH. U. J.L. & POL'Y 7, 14 (2014).

121. *Id.* at 28 (panel speaker names removed).

122. See 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, 216–20 (2022) (finding evidence of coercive pressure on states to join the Inclusive Framework).



terms of negotiation theory, the unilateral enactment of FATCA by the United States effectively created a new, and worse, BATNA for other countries with a significant banking sector. In response to FATCA, the other countries had to choose between entering negotiated agreements they had not supported prior or risk the IRS imposing FATCA penalties on their banks.

From a negotiation theory standpoint, it would be difficult to argue that FATCA was anything less than a complete success. Prior to FATCA, no country would automatically share tax information from within its border with the IRS; after FATCA, over 130 countries have entered into agreements to share such information with the IRS. Equally as important, the extraterritorial reporting and withholding provisions of FATCA have yet to be applied by the IRS within other states. Given the FATCA experience, there would seem to be little reason similar tactics would not also be effective in achieving a successful negotiated agreement in the BEPS context as well. The ensuing optimism that a negotiated agreement was realistically possible under BEPS began to be reflected not only in public statements by certain public officials<sup>123</sup> but also in some of the academic literature as well.<sup>124</sup>

Yet, once the complexities of multiparty negotiations and time-value from deferring are introduced, the exact same set of facts may not so clearly point in favor of a final negotiated agreement. Under a rational-actor-negotiating model, countries which have been successful in using tax competition to generate economic growth and development should only join a negotiated agreement if the payoffs of the agreement exceed the status quo under tax competition. Even further, for the most successful tax competition countries (such as Ireland)<sup>125</sup> it could be

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123. Press Release, U.S. Dep't of the Treasury, *supra* note 2 (“Today’s agreement by 130 countries representing more than 90 percent of global GDP is a clear sign: the race to the bottom is one step closer to coming to an end.”).

124. Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT’L L. 353, 401 (July 2020) (“This Article thus argues that one of the most important—if underappreciated—outcomes of BEPS is that by increasing the salience of distributive issues and creating an inclusive forum for negotiating distributive outcomes, *BEPS made it more, not less, likely* that states would seriously reconsider longstanding distributive questions.”) (emphasis added).

125. See Naimi Jagoda, *Ireland Joining International Agreement on Global Minimum Tax*, THE HILL (Oct. 7, 2021, 2:15 PM),

possible that they could never receive enough value under a negotiated agreement to justify joining the agreement. At the same time, the costs or other penalties of not starting and/or leaving active negotiations toward a final anti-tax competition agreement are greater than the benefits from tax competition. In this case, such countries acting rationally could not choose any option that would result in the conclusion of active negotiations, regardless of whether it concludes in a negotiated agreement or in a failed negotiation.

#### D. A Path to a BEPS Endgame

Taken together, while penalizing insincere parties can well be effective in preventing those parties from leaving active negotiations, the same penalties might not make them particularly amenable to achieving a final agreement.<sup>126</sup> Assuming this to be the case, if sincere negotiating parties find themselves in a False Negotiation then imposing any additional penalties on the false-negotiating parties could only exacerbate the underlying problem that led to the False Negotiation in the first place.<sup>127</sup> Even further, at least theoretically, if the penalties are creating the incentives that are preventing a final negotiated agreement then it would make sense that removing those same penalties might increase the incentives to reach a final agreement (at least as compared to the status quo).<sup>128</sup>

The problem with the idea of removing penalties to increase the odds of a successful negotiated agreement is that the penalties preventing a successful outcome from emerging are the same ones preventing a failed outcome. Thus, removing such penalties not only increases the chance of success but also increases the chance of failure. In other words, the chances of a successful negotiated outcome increase

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<https://thehill.com/policy/finance/575790-ireland-joining-international-agreement-on-global-minimum-tax>; Halpin & Humphries, *supra* note 107.

126. See P. Jean-Jacques Herings & Harold Houba, *Costless Delay in Negotiations*, 74 *ECON. THEORY* 69, 70–71 (2022). One interesting result is that under an assumption that delay is truly costless to all parties it is possible to define a set of conditions under which no subgame perfect equilibrium exists. *Id.* By excluding such conditions, a Condorcet Paradox can be avoided, and dominant strategies can be identified. See P. Jean-Jacques Herings & Harold Houba, *The Condorcet Paradox Revisited*, 47 *SOC. CHOICE & WELFARE* 141, 158 (2016).

127. See Gluzman et al., *supra* note 51, at 672–74.

128. See Anand et al., *supra* note 33, at 2.

because the chances of any negotiated outcome increase. For this reason, it may not always necessarily be net positive to do so in every situation. Rather, to make a decision the parties would need to consider the payoffs under two alternatives based on a risk-adjusted present value basis: (1) remain in False Negotiations indefinitely with little chance of achieving a final agreement but also not losing the status quo, or (2) break out of the False Negotiations and face a state with some positive likelihood of reaching a final agreement but also some positive likelihood of a failed negotiation. In the context of BEPS, if FATCA truly did represent a watershed change in the incentives of states to engage in negotiations, then on its face, the simplest response would be to repeal FATCA (and its parallel provisions in BEPS). By removing this “doomsday device” countries currently engaged in insincere negotiations would be free either to transition into the Value Claiming Stage and/or the Closing Stage on the one hand or to leave the negotiations on the other. Removing the incentives that reward False Negotiations will allow BEPS negotiations to finally enter their endgame.

In this respect, the False Negotiations analysis can be thought of as related to or even a consequence of another aspect of the BEPS process that has recently been coming into question—so-called “mission creep.”<sup>129</sup> The problem with mission creep is that the stakes continue to increase after the parties initiate negotiations thereby changing not only the payoff structures of the parties involved but potentially also their dominant strategies as well. Mission creep not only risks loss of focus and delays but also, more importantly in this context, raises the stakes of the outcome of the negotiations.<sup>130</sup> While, of course, the details of any given situation would depend on the

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129. See Jeff VanderWolk, *A Whole New Ballgame: The Global Tax Policy Negotiations on Pillars One and Two*, BLOOMBERG TAX (May 13, 2021, 2:01 AM), <https://news.bloomberglaw.com/daily-tax-report/a-whole-new-ballgame-the-global-tax-policy-negotiations-on-pillars-one-and-two?context=article-related> (“What almost no one is talking about, however, is that the project’s original purpose—updating international tax rules to deal with digitalization—seems to have been completely abandoned. In this case, “mission creep” appears to have resulted in a whole new ballgame.”).

130. See generally Jessica Einhorn, *The World Bank’s Mission Creep*, 80 FOREIGN AFFAIRS. 22 (2001) (discussing how the World Bank has increased the number of complex tasks it takes on making it more challenging to fulfill its primary purpose).

specific facts and circumstances of that situation, theoretically it logically follows that as stakes increase than the intensity of the parties' preferences would intensify as well. For this reason, even relatively minor disputes over technical details in a single Action Item often are treated as existential threats to the long-term success of the entire BEPS project.<sup>131</sup> In this manner, even suggesting the option of a failed negotiation over even the smallest agenda items can be seen as an existential threat. It is completely understandable that the most ardent supporters of BEPS would not be able to accept or even entertain the idea of providing a handful of small states the power to undermine all of the success BEPS has achieved to date.<sup>132</sup> A comprehensive analysis of mission creep is beyond the scope of this article but is relevant to many of the lines of BEPS literature and may need to be incorporated in a more explicit manner in any theoretical analysis of BEPS going forward.

Another alternative theory known as the "False Readiness" theory has recently been introduced into this analysis to explain seemingly successful negotiations which never reach any final conclusion.<sup>133</sup> False Readiness can be distinguished from False Negotiations in that it looks to the motivations of parties to enter the negotiations rather than incentives to stall the negotiations after having joined. This can arise in particular in the multilateral context involving parties with vast power disparities. Under such conditions, False Readiness proposes that the entire purpose of a party to join a negotiation would be to stall or delay any agreement while appearing to be supportive. In the words of the authors:

The prevailing assumption is that if disputants decide to enter negotiations, they must have "crossed the Rubicon" and wish to reach agreement. This is not always the case in protracted conflicts where parties enter negotiations

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131. See, e.g., Connor L. Smith, Note, *Reflections from the Brink of Tax Warfare: Developing Countries, Digital Services Taxes, and an Opportunity for More Just Global Governance with the OECD's Two-Pillar Solution*, 63 B.C. L. REV. 1797, 1839–48 (2022).

132. See, e.g., Arthur J. Cockfield, *Tax Wars: How to End the Conflict over Taxing Global Digital Commerce*, 17 BERKELEY BUS. L.J. 347, 372–73 (2020).

133. See, e.g., Adi Schwartz & Eytan Gilboa, *False Readiness: Expanding the Concept of Readiness in Conflict Resolution Theory*, 23 INT'L STUD. REV. 1328 (2021).

for reasons other than reaching [agreement]. Existing CR theories do not adequately address this phenomenon.<sup>134</sup>

Based on this False-Readiness approach, once a multilateral negotiation begins to appear to enter a protracted repetitive cycle of optimism and disappointment and never reach a final agreement, one possibility that must be considered is that one or more parties entered the negotiations with the intent to undermine them. In such case, any hope for an ultimate agreement depends on identifying the “FR” party and excluding them from the negotiations altogether. There is also no reason to think that the FR party necessarily has to be one of the smaller or less developed country participants in BEPS; rather, the countries most likely to be FR parties would be the ones coming into BEPS with the strongest precommitment to a particular outcome. From this perspective, it was the United States that not only entered into the BEPS negotiations vocally and strongly opposed proposals to tax (primarily US-based) digital companies<sup>135</sup> but since then has successfully negotiated multiple deferrals of the deadline to implement a new digital tax deal.<sup>136</sup> This is not to say that there is necessarily any reason to believe that the United States has been a FR party to the BEPS negotiations but only that once a repetitive cycle pattern can be observed in any multilateral negotiations there is no reason on its face to rule out any party to the negotiation as having played some role in

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134. *Id.* at 1328.

135. *See, e.g.*, U.S. TRADE REPRESENTATIVE, REPORT ON FRANCE’S DIGITAL SERVICES TAX 30–74 (2019), [https://ustr.gov/sites/default/files/Report\\_On\\_France%27s\\_Digital\\_Services\\_Tax.pdf](https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf) (opposing France’s proposed 3% digital services tax on “digital interface” and “targeted advertising” services). Shortly after it issued the report, the U.S. Trade Representative issued a notice that it intended to adopt retaliatory tariffs against France in response. Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France’s Digital Services Tax, 84 Fed. Reg. 66956 (proposed Dec. 6, 2019).

136. Christopher Condon et. al, *Truce on Digital-Tax Extension Sets Up US Clash with Canada*, BLOOMBERG (July 12, 2023, 2:00 AM), <https://www.bloomberg.com/news/articles/2023-07-12/us-wins-conditional-digital-tax-truce-as-global-deal-advances?embedded-checkout=true>; *see also Countries Agree to Extend Digital Services Tax Freeze Through 2024*, REUTERS (July 12, 2023, 1:54 PM), <https://www.reuters.com/business/finance/countries-agree-extend-digital-services-tax-freeze-through-2024-2023-07-12/>.

that pattern emerging. Ultimately, this kind of honest introspection by all parties involved when confronting stalled multilateral negotiations such as BEPS may well prove to be the most important lesson that can be learned by applying the False Negotiations model to BEPS. Negotiations can fail for any number of reasons, and even every party working together in good faith does not guarantee a successful outcome, but the lessons of those failed negotiations can be internalized and the problems avoided going forward. In other words, to paraphrase Tolstoy, all successful negotiations are alike, but each failed negotiation failed in its own way.<sup>137</sup>

## V. CONCLUSION

By all accounts the international tax regime is facing a transformational if not existential moment, spearheaded by the OECD Base Erosion and Profit Shifting project. While BEPS may have started as a series of technical fixes by the OECD to defend the international tax regime in response to aggressive tax structuring by multinational taxpayers, through a series of remarkable successes, BEPS grew into a collection of nearly every country in the world negotiating a fundamental reform of the entire regime itself. From this perspective, BEPS can only be seen as one of the most productive and successful international negotiations ever. Yet just as much as its successes, BEPS has been defined by a continuing series of setbacks, delays, and disappointments as well. For the most part, these have been disregarded as mere speed bumps along the trajectory towards success to be expected in any undertaking with the scale of BEPS.

This article proposes that the small but recurring setbacks within BEPS may not be a bug in the system but a feature that must be seriously considered as such for them to be overcome. From this perspective, the article applies recent developments in the negotiations literature to identify conditions when parties may actively engage in negotiations, but rather than seek a final outcome, these parties prefer to defer or delay negotiations indefinitely. In the presence of such parties, one would expect to perceive a series of negotiations that repeatedly appear to have made significant breakthroughs yet repeatedly fall just short of a final agreement. To the extent this

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137. LEO TOLSTOY, *ANNA KARENINA* 1 (Richard Pevear & Larissa Volokhonsky trans., Penguin Books 2001) (1878).

describes BEPS, the incentives of such “false” or “insincere” negotiating parties and the incentive structures that allowed them to emerge must be incorporated into the analysis before any final outcome—successful or not—can become possible. Only in this manner can BEPS break out of this cycle and finally enter its endgame.