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Conceptualizing a New Institutional Framework for International Taxation: April 1, 2013

The following represents an edited transcript of a colloquium held at Washington University School of Law on April 1, 2013, entitled “Conceptualizing a New Institutional Framework for International Taxation.” The presentation was in the form of a dialogue among participants, but it has been edited to read as a narrative on the topic. The transcript will begin with an introduction from Leila Sadat, Henry H. Oberschelp Professor of Law and Director of the Whitney R. Harris World Law Institute, the sponsor of the colloquium.

LEILA SADAT: My name is Leila Sadat and I direct the Harris Institute. I’m here for a thirty-second infomercial to talk to you a little bit about the Institute, but more importantly, to thank Adam Rosenzweig, who’s put together this wonderful panel. The Harris Institute has had many international business and international trade lectures this spring, in an effort to branch out and look more at the private and public commercial law area. And a key goal of the Institute, of course, is to foster collaboration, dialogue, and exchange among scholars and practitioners. I cannot think of a better or more timely panel than this one in order to do that. I know almost nothing about this entire subject, but what I’ve learned in my very short time with these panelists is that this is a subject that incites a lot of passion, because they have managed to debate it extremely vigorously. I haven’t seen such vigorous debates about war crimes, genocide, or the other areas I work on as I have about international tax policy.

I want to thank all of you, as well, who made the journey either from Canada or somewhere a little closer to come to St. Louis. With that, I am going to sit and listen and learn, and I’m going to turn the floor back to Adam.

ADAM ROSENZWEIG: Thank you very much, Leila, for those kind words. And also thank you for both sponsoring this event and being the impetus behind it. It would not have happened if you hadn’t

encouraged me to pursue this, and so I really appreciate all of your personal support and the support of the Harris Institute.

Before we get started on the panel, I just wanted to briefly introduce the panelists. The goal of this roundtable is to bring together a diverse and wide range of different kinds of expertise on this issue, especially because we seem to be at a defining moment in the international tax regime. And the institutions and systems that are in place are really starting to reach a point where most are trying to reconceive what the proper role of institutions should be in the world regime.

Immediately to my left is Allison Christians, the H. Heward Stikeman Chair in the Law of Taxation at McGill University. She practiced law at Wachtell, Lipton, Rosen & Katz in New York and also Debevoise & Plimpton. She taught at the law schools of the University of Wisconsin and Northwestern University, where we overlapped briefly, before she joined the faculty of law at McGill. She is the author of a column for *Tax Notes International*, as well as an editor for the tax section of *Jotwell*, an online peer-review journal, and is the lead blogger for an influential blog, *Tax, Society and Culture*.

Next to Professor Christians is Itai Grinberg, Associate Professor of Law at Georgetown University Law Center. Professor Grinberg joined Georgetown from the Office of the International Tax Council at the Department of the Treasury, where he represented the United States on tax matters, both in the multilateral and bilateral tax settings. Prior to joining Treasury, he practiced tax law at Skadden, Arps, Slate, Meagher & Flom. He focused primarily on international tax and planning. He also served as counsel to the President's Advisory Panel on Federal Tax Reform and is a member of the Council on Foreign Relations.

Next to Professor Grinberg is Michael Lennard, the Chief of International Tax Cooperation and Trade at the Financing for Development Office of the United Nations (UN). He is pretty much the person in charge of the Tax Cooperation project for the UN. Previously, Mr. Lennard was a tax treaty advisor for the OECD Tax Treaty Secretariat and also worked at the Australian Tax Office. He has published work on treaty interpretation, and has been cited before World Trade Organization (WTO) panels and the WTO appellate

body. He has degrees from the University of Tasmania, the Australian National University, and Cambridge.

To his left is Diane Ring, Professor of Law at Boston College, where she works primarily on issues of international and corporate tax. Among her many other activities, she was the U.S. National Reporter for the 2012 IFA Conference on the Debt Equity Conundrum, and the U.S. National Reporter for the 2004 IFA Conference on Double Nontaxation. Before joining Boston College, she was an Associate Professor at the University of Florida and an Assistant Professor at Harvard Law School. Before that, she practiced law at Caplin & Drysdale.

To her immediate left is Lee Sheppard, contributing editor at *Tax Analysts*' "Tax Notes." Ms. Sheppard is probably one of the most influential tax journalists in the country, and is one of the most influential and most knowledgeable people on international tax matters. Lee Sheppard has a law degree from Northwestern University School of Law.

What we're going to do first is give each of our speakers an opportunity to speak about their personal opinions on the state of the current international tax regime and where they would prefer things to go. Then, we will open up the floor and have a conversation among the panelists. So with that, I'll hand it over to Professor Christians.

ALLISON CHRISTIANS: I think this roundtable format is really an interesting phenomenon. While I appreciate the audience, for me, this is a learning experience, because I get to sit here and debate with people who know much more than me about everything I talk about. That's always humbling. But it can be the moment when you realize how to think about things in a different way. So I thought I would talk briefly about the fact that we are in a kind of confusing time. I think part of the confusion is that the media coverage of tax, and international tax, specifically, is actually quite muddled. They don't give you a great grounding, and it takes a lot of work to interpret what the media is telling the public.

I think two stories are being told right now to the American news consumer and they are getting conflated a lot. I think the first story is that we have a big problem with shirkers. That is, America has a

problem with the rich not wanting to pay their share, and the way they get out of their obligations is through tax evasion. It turns out there are other countries that are willing to help them, and it is patently obvious that this is objectionable behavior to everyone. So we ask the questions, why doesn't our government stop that? Why don't we stop these rich people from hiding their money in other countries? Can't we stop them? Is this a capacity problem? And then we get stories about the Internal Revenue Service (IRS) cracking down on various behaviors, and it turns out we *can* stop them. We can find out about people with accounts offshore, so why is this still a problem? That is one thread of stories you'll see: "Tax evasion! This is pervasive, it's out of control! Has the state lost its way? Why can't we stop this?"

The other story, which is related but distinct, is that we have multinational companies that seem to be doing something very similar, but it's not tax evasion—it's perfectly legal. So why are we allowing that? Why is my government allowing that? It seems to me that it's not that the companies are doing something we didn't know about that we are now finding out about and trying to figure out how to stop. Rather, it's that the government is actively encouraging this. Congress keeps passing the same tax break—yet another way to make sure multinationals don't have to pay tax anywhere. And so you get the story of Google paying 2.4 percent and Apple having billions of dollars offshore. What in the world is going on? Have we lost control?

So I think those two stories are being conflated, and you'll see a lot of activism conflating those two stories and saying we have a governance problem.

If you put those two stories together, we do have a major governance problem. Our governments are failing us and so are our multilateral approaches, such as the multinational institutions. But these approaches and institutions aren't new. We didn't just start this process of coordinating taxation across borders. The Organization for Economic Cooperation and Development (OECD) has been around for fifty years, and before then, we had the League of Nations. What are these organizations doing, if not working together to create some sort of coherent system in the world? What are we paying all of these experts for when it doesn't seem to be working?

So let's just throw all that out there to start this conversation.

But let's also observe that these seem to be two distinct phenomena that we conflate into a governance issue and then try to solve all at once. I think they are distinct and they raise distinct governance questions that are difficult to answer.

ITAI GRINBERG: I would start out by agreeing with the basic two-part framework that Allison described, because I agree that is the right way to think about the problems. I think when you talk about individuals and the world of cross-border cooperation, the discussion is about offshore tax evasion. Offshore tax evasion is just illegal. And addressing offshore tax evasion is therefore a law and order question. It's about how we enforce compliance with the set of rules that are already on the books. In the United States, we have a voluntary compliance system with lots of safeguards. But we don't have all of the information regarding voluntary reporting or withholding or both, and sometimes people don't comply. Over the last five or six years, we have seen a series of scandals that have drawn attention at the highest political levels to the fact that sometimes wealthy individuals choose not to comply with tax rules, and that they do this by ensuring both their domestic business income and their investment income are earned through offshore accounts, thereby avoiding either withholding or reporting, and enabling evasion.

That is a really different problem from the second problem that Allison raised, which is the question of base erosion and profit shifting by multinational corporations. Multinationals are engaging in perfectly legal behavior. This is important to understand. They may take aggressive tax positions with respect to certain kinds of transactions or return positions that they have; but, by and large, what they are doing is, at a minimum, colorably legal. They have opinion letters and counsel that suggest the tax positions they are taking comply with the letter of the law. They are often right about that. There is just a concern in the world that maybe the regime we put in place has allowed multinational corporations to reduce their tax burden by more than the various governments intended or more than they thought they were agreeing to over time, in what is a very long process.

The international tax compromise dates back to the 1920s and teens. Back then, the appropriate way to think about cross-border foreign direct investment was largely bilateral. When you thought about a U.S.-based multinational doing business in the United Kingdom, you thought the U.S.-based multinational would operate either through a branch or a subsidiary directly owned by the U.S. parent. That was, in fact, how business was done. So the purely bilateral structure of tax treaties that came into being then made a lot of sense on some level. Cross-border investment was, to a very important degree, a bilateral question.

With regard to the planning, the real structure, of a particular U.S.-based multinational whose identity is concealed: for my purposes here, the first point to take away from that not-atypical structure is that, today, investments by multinational corporations are not, as a general matter, directly bilateral. Instead, they are intermediated through entities in third-country jurisdictions. And that raises a different set of problems than the problems faced by the creators of the first model treaties after World War I.

What I'd like to do for a minute is to deepen our perspective on the offshore tax evasion side, just to give us a sense of the international dimension of the problem, as opposed to the domestic dimension of the problem. Almost eight trillion dollars, representing more than 6 percent of all global wealth, is managed through offshore accounts. Now, I've already told you that represents both investment income and business principal, but let's just make sure we understand what I mean by the term "offshore account." When I say "offshore account," I mean an account in a financial institution outside your own country of residence, like on an island or a beautiful, mountainous, landlocked location, or, maybe, Miami. And let's be clear, that last point is important: for Latin Americans, it very well could be, and often is, Miami.

Juxtapose the fact that investing through offshore accounts has gotten easier over time with two other realities. First, cross-border administrative operations to help governments tax income earned or held through foreign accounts by resident country taxpayers had, until a few years ago, remained largely unchanged since World War II and is pretty limited in its practical effect. Second, the extent to which assets are managed offshore is not uniformly distributed

around the world. In general, emerging and developing economies are relatively more exposed to offshore tax evasion than are the large developed economies. To put numbers on that, less than 2 percent of North American residents' wealth is held offshore, while in contrast, more than 25 percent of Latin American household wealth is held in offshore accounts, and probably 40 percent of African household wealth is held offshore. Further, the OECD once suggested that offshore tax evasion costs emerging and developing economies amounts that begin to approach the amount of total official development assistance they receive—in other words, all foreign aid by all governments.

Beginning in 2008, however, some well-publicized cross-border tax evasion scandals focused the highest level political attention on offshore tax evasion in precisely those countries least affected by the problem but most able to do something about it. The stories really do read like a thriller. Tax is boring. But these were stories about toothpaste tubes full of diamonds being smuggled out of the United States. These were stories about big governments finding disgruntled bankers buying lists of clients from their banks and, in return, providing them new identities and a whole new life on another continent. This starts to sound like a spy novel. But the thing was, these stories made offshore tax evasion a concern of the G-20 when it had previously been only a tax administrator's concern. The G-20 actually put out a document that said, "The era of banking secrecy is over."

Then there was a multilateral response, which initially involved threatening to force bank secrecy jurisdictions to accept very minimum global standards on the exchange of requested information. Pretty soon thereafter, major developed economies took steps that made it clear that they viewed those rules, which allowed for cross-border inquiries if and only if you knew *which* taxpayer to ask about and *in what bank* they held their account, to be pretty darn inadequate. These economies wanted something more systematic. So eventually that shared interest in a multilateral response led to part of a multi-pronged U.S. strategy to address offshore tax evasion. The strategy took everyone's rhetoric at its word and combined multilateral cooperation with a very aggressive unilateral component. The U.S. approach effectively required foreign financial institutions

to report directly to the IRS about accounts held by U.S. persons. And, importantly, those reporting requirements applied regardless of restrictions placed on financial institutions under their domestic law. The legislation then threatened to withhold most payments coming out of the United States to either those institutions or their clients if the institutions did not comply.

By tax law standards, America's far-reaching sanction on foreign financial institutions for doing something that violates neither contractual commitments nor rules on privacy nor data protection in their home countries is quite draconian. At the same time, it's also an axiom of modern finance that, for a variety of reasons, all of the major players have to do business in the United States or with U.S. institutions. As a result, these large multinational financial institutions are between a rock and a hard place. Meanwhile, foreign sovereigns have looked at the legislation and thought, "How do we address this, both on our own behalf and on behalf of our financial institutions?" These sovereigns are keenly aware that the Foreign Account Tax Compliance Act (FATCA) was unilateral: the United States asked for information from abroad but gave nothing back in return.

But the displeasure with the unilateral nature of FATCA, combined with the shared desire to address offshore tax evasion, has produced a multilateral dialogue. The question now is how to emulate this legislation but make it both implementable—so that it doesn't require private parties to violate local law—and more reciprocal—so that it addresses the offshore tax evasion concerns of cooperating governments other than just the United States. 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, but not everyone agrees it will resolve the issue well. Still, everyone thinks it's happening and it wasn't happening before. So what I am trying to point out is that there is kind of a dialectic to some of these things. You may think you get from point A to point B in a straight line, but you don't always get there in a straight line. Sometimes you have to go from thesis to antithesis to get to synthesis; from the idea that there is a shared interest that deserves a multilateral response to

aggressive unilateral action in order to get to an efficacious multilateral response to a global problem. I think that sort of dynamic is worth thinking about when you think about the international tax system, both with regard to offshore tax evasion and with regard to addressing profit shifting by multinational corporations.

The last thing I would point out is that the solution to the offshore tax evasion issue largely involved the G-20 bringing the question of offshore tax evasion into the broader framework of international financial law. It involved using institutional vehicles that were previously familiar with areas like capital adequacy standards and addressing money laundering and terrorist financing. In the future, I think analysts should be cognizant of those precedents when they see the G-20 engaging in tax matters. Tax is getting pulled into a kind of international soft law structure that a lot of people have a lot of experience with. It just turns out people who have experience with it are mostly not tax lawyers. You can think about the G-8 and the way the Basel Committee [on Banking Supervision] works, or a variety of other institutions that are out there. That may tell you something about where we are headed with respect to international tax law and international tax cooperation, including in connection with the OECD's Base Erosion and Profit Shifting project.

MICHAEL LENNARD: I will speak entirely in my personal capacity, probably because you can never achieve agreement among the 193 members of the UN. But also because a lot of these things have not been fully discussed in the UN, so speaking in my personal capacity gives me a lot more freedom. The background that I look at is the UN background, and therein lies part of the problem. In our tax work, a lot of people initially thought we were very anti-business at the UN, which is not true at all. We basically have three pillars of our work and everything is a bit of balance between those pillars. The first pillar is that countries need revenue to get public goods, which leads to development. Our work is very much in the development context and also concerns allowing countries to assert their sovereignty, so that in the global economic crisis, they have a bit of a buffer against what is happening in the rest of world, which in some respects is an issue of sovereignty—something that is always very important in the UN.

The second pillar makes things a bit more complex. Nearly every country in the world sees foreign direct investment as helpful for development. But at the same time, it is up to each country how it wants to develop. This means that most countries are seeking a way to create sufficient public revenue for use on public goods. They recognize it is important to lifting people up out of poverty, affording them dignity, and achieving specific development goals. But they also want to have the right sort of investment. They don't want to strangle the golden goose. They want to have a regime that actually encourages investment so that it will lead to long-term benefits for their people, including getting business expertise and so forth.

And the third issue, which is a very interesting issue at the moment, is who creates the norms. Because in the UN, we believe there shouldn't be "norm-makers" as distinct from "norm-takers." You have heard the reference to the OECD's work with the G-20 on base erosion and profit shifting, and I won't go into detail on that, but there are hints that there needs to be a change in the way we look at taxation. Particularly in the new digital economy there have been battles about this within the OECD. There are different views, for example, about the level of economic engagement that could allow a source country (the country that is not the resident state of the investor) to tax activities in that country. This is because there's an idea that you shouldn't try to tax everything that happens in your country, because you want to give businesses the chance to put a toe in the water to see if it's right for them to do business in your country. Then, at a certain point, the investor becomes so engaged that it becomes proper for both the investor's country of residence *and* the country where the investment is made to tax the profits of the investment. And that's a problem, because if you have double taxation on the same person—or even on the same profits of the corporate group—that cuts against the other intent I mentioned of trying to encourage foreign investment.

It's a very interesting time, partly because we are moving to a more multipolar world in the area of taxes and so many other areas. We did some work on transfer pricing, which can equate to international profit shifting. A "transfer price" is just the price that multinational corporations have to allocate to transactions within their corporations, to find out which areas are doing well and which

areas are not doing well, which are well-run and not so well-run. However, there can be abuses of this so-called transfer “mis-pricing,” where profits can be shifted into low-tax jurisdictions and out of other jurisdictions, like developing countries. That can seriously affect tax revenue for the developing countries.

Where profits are taxed depends on where value is created, and there are often different views on this. One example is that in India, you don’t buy a Suzuki car. You buy a Maruti Suzuki car because when Suzuki initially went into India, no one really knew about Suzuki, but they knew about Maruti. There was a benefit to Suzuki in having “Maruti Suzuki” vehicles. There are all sorts of issues about where the value in the Maruti Suzuki brand originates. How much of it belongs to Suzuki (i.e., imported value)? How much of it belongs to Maruti (i.e., home-grown value), which enhanced the value of Suzuki? And how do changes in value occur over time?

So there are some issues there; and I think in the OECD’s work, there is a tension between value being created in both these areas in the market, but also in the Research and Development manufacturing area. How do you allocate that? We see this in the work we’ve done on transfer pricing in India and China. We gave them some space in Chapter 10 of the *UN Practical Transfer Pricing Manual for Developing Countries*, and they both put a lot of emphasis on the advantages or special value added by their markets and how to attribute that value when determining profits.

And how you attribute that value to the global group as a whole is quite a controversial area, but it shows a bit of a changing of the guard. That’s not as true in the OECD report—they still refer to the marketing and branding as the tail end of the value creation, which I’m not sure India and China would really agree with if they thought about the implications. We are moving towards a more multipolar world, and one of the interesting things, as a lawyer, is that none of these solutions are easy.

Obviously, I work for the UN, so I believe in multilateral solutions. But I think, in the end, these areas are so complex that sometimes you need a smorgasbord of different approaches to deal with them. Sometimes unilateral actions can offer a benefit toward actually getting something to happen. And a lot of UN countries look to what’s happening in the European Commission, such as on the

common consolidated corporate tax base. They look at whether that works and whether, at the regional level, that will have a broader impact.

But there are some downsides to unilateralism. Of course, one of the downsides is that you're back in the old "norm-makers" and "norm-takers" approach. Another downside is that a unilateral solution may have some real defects. If the unilateral solution comes from the United States, then, dare I say, there might be some problems with it, which, for lobbying or other reasons, are never addressed. Even if that unilateral solution leads to multilateral solutions, you may not be able to deal with some of those deficiencies, and you may create distortions, and so forth. There are some other downsides, too. One is that unilateral solutions tend to come from developed countries, and when that does happen, they're often very complex. At the UN, we believe that sometimes, even if there's a genuine problem, a really complex solution is not actually in the interests of developing countries. They just don't have the capacity to deal with really complex solutions, and they feel, justifiably or not, that if a complex solution is required, or a complex regime is in place, then they're going to start from a position of weakness when they sit down with a multinational enterprise, or with the United States Treasury, or with the IRS. This is a really difficult concern to avoid, because there are not many simple solutions in this area. Sometimes I think we have to have solutions that are graduated, so that, for example, countries that are just coming to the world of profit shifting may be able to have a bit more freedom with their rules, at least in the short term.

But, again, there's a strong quest for a single set of rules in this area, which doesn't always work, in my experience. Everyone wants a single set of rules, but when you speak to someone singly, you realize some want to drive on the left-hand side of the road and some want to drive on the right-hand side. And each is convinced that that's the best rule for the world. It's just not going to happen that you get complete certainty. So what we try to do in the UN is recognize that there will be differences, try to minimize the number of unnecessary differences, and help countries to make informed decisions about which route to take. Some solutions that might work for China might not work for Botswana, for all sorts of reasons.

One set of solutions are the bilateral solutions, such as double tax treaties. We have our own Model Tax Treaty, and it is very much a model that gives options to countries. If you have strong withholding taxes, that can be good for a developing country, because withholding taxes are a pretty easy way of making sure your country can actually get some tax revenue from royalties or interest payments and dividend payments. On the other hand, you don't want to tax, say, royalty payments related to intellectual property so high that no one will send new intellectual property into your country, and your country won't develop because it won't get the expertise which allows you to develop. So everything is a balancing act in this area. Another problem with the bilateral solution is that it can become horrendously out of date because you have a certain treaty network, and the more countries you're dealing with, the harder it is to find time to go back and update, particularly to deal with new tax avoidance approaches.

Multilateral treaties have a lot of potential benefits, as long as they have sufficient real political support and real support on the ground. One of the issues at the moment is this talk about reshaping the norms of international taxation. I think there's a hint of seeking a multilateral agreement about what's called "permanent establishment." This is considered the minimum threshold level of economic activity of a non-resident business in a source country before that source country can impose income tax on that business under a tax treaty.

One of the benefits of the multilateral approach is the "stickiness" of genuinely agreed-upon norms. But to get a really sticky norm that people will actually feel ownership in, and will abide with in practice, you need to engage them in the process of actually developing those norms. One of the risks I see at the moment for trying to reshape the norms is that there is a sense that, to keep the G-20 support, things have to happen quickly. Because we all know political will can dissipate overnight, as politicians become focused on other issues. A lot of international politics is very short term. And one of the problems is, if you try to respond by remaking the world very, very quickly, how are you going to make sure you have norms that developing countries, particularly those who are not in the G-20, actually feel that they have any commitment to or ownership of? In

the end, if you're not careful, you might end up with a system where you have some headline agreement—"we've remade the rules for international taxation"—but, in practice, the rules are actually all interpreted in completely different ways around the world. So I think there are some real issues. I believe the UN is not used as much as it should be on these international tax issues to seek real agreement that will not unfold in practice.

Another aspect of the multipolar world is the role of Non-Government Organizations (NGOs). NGOs are driving a lot of this debate and they have a role that I think is legitimate. We've always recognized the importance of NGOs in this debate at the UN. We've recognized the importance of giving a voice to taxpayers who do pay their due taxes, expecting that others will pay their proper tax bill. But, then again, there's a responsibility for NGOs not to unfairly target companies that might actually have been doing the right thing, and not to make them subject to a boycott they might not deserve.

Often you hear a reference to a company, and then you'll see that everyone accepts what they're doing as perfectly legal. Well, even that debate could be opened up a bit. First of all, you often don't know until you've done a full audit whether they have fully accounted the amount of that intellectual property that should relate to the sale in the United Kingdom, United States, Australia, or developing countries. You often don't know. But even if you do, I can see a lot of taxpayers saying, "Well, even if it is legal, that doesn't really answer my question," because the multinationals that are involved are so powerful that they actually have a big role in shaping the law. So it is not a complete response for the companies to say, "We're abiding with the law and that's really all we need to do." There are issues about whether the law is shaped too much in favor of multinationals, as opposed to in favor of the person who pays their taxes.

And there's another aspect, and that is the belief that strict compliance with the tax laws is enough. From the UN perspective, there are some disadvantages to strict compliance for developing countries, because developing countries often don't have the robust legal mechanisms that developed countries do. So if we put a lot of emphasis on a strict compliance approach rather than a more purposive approach, then are we disadvantaging developing countries

that are not in a position to have huge teams of people dealing with complex transfer pricing legislation the way developed countries might? Sometimes you need a purposive approach that says, “Well, we never anticipate that a company would do this, but, in the wider scheme of the legislation, if a company does this, this company should be regarded as having taken too many risks, and having not acted in accordance with the intent behind the legislation.”

DIANE RING: I thought at this point, first, I would disagree with Itai completely. International tax is the most interesting thing I could ever imagine doing! So part of what I want to do is just touch upon one issue that’s been hinted at during different parts of the conversation so far, because it really is exciting. As Allison outlined, we’ve got two major sets of problems. One is the world of “I’m not paying my taxes, I’m hiding my money.” That is clearly illegal. Then, the other is the way corporations, whether acting in a way we think of as strictly legal, moderately legal, or legal with a wink, have substantially reduced their contribution to government revenues across the globe.

When Adam raised the idea of this roundtable with us, one of the points he focused on was the question of what kind of cooperation we seek, what kinds of international organization we want engaged in these problems, and how we should think about this process going forward in a global manner. So I would pick up on one thread of that. I think the locus for change might need to shift. There are different types of change when responding to non-identical problems. And the change itself could be procedural or administrative or substantive, depending on exactly what part of the problem you’re looking at. But before considering the contours of any solution, it may be useful to be explicit about why governments and policy analysts should care about both tax evasion and tax avoidance. The reason is the loss of revenue. Countries are missing actual tax revenue, and the combination of avoidance and evasion is changing who pays the revenue that is collected.

Additionally, to the extent that taxpayers pursue tax planning opportunities based, for example, on transfer pricing and hybrid entities, not only is tax revenue lost but so is underlying business activity. In order to secure the significant gains of tax avoidance,

taxpayers may actually shift some activity—not enough to change the view that the transactions constitute “tax avoidance,” but enough to increase the likelihood that the desired tax treatment will be secured. So there are all kinds of impacts that come from the problems being described.

That leads me to the question, who are all of the players? You have lots of different people who care. You have different governments, and we’ve heard discussion about developing countries, particularly the UN perspective. We know the multinationals and their advisers are also engaged and powerful forces in the tax picture. Thus, we need to think somewhat multilaterally to address some of these questions, such as whether organizations currently playing a key role remain the best locus for discussion, cooperation, and/or change going forward, or whether a different organization might have advantages. It is not hard to imagine that many of the problems of evasion and avoidance cannot be resolved unilaterally. States need information and control over taxpayers. They may need various forms of administrative assistance. Thus, there has to be some kind of coordination. When you envision that kind of coordination, you imagine countries and their representatives coming together in some way.

Let’s imagine we have that. So we’ve identified settings in which these conversations are going to take place. Whether these are existing settings or new settings, countries are sending their representatives. Let’s even imagine those representatives are thrilled. And they’re thrilled not just to be in Paris—that’s probably where we want to hold it, someplace lovely—but they are thrilled because they are really excited to converse. They actually care about which taxpayers bear the tax burden, whether countries are collecting enough revenue, and whether developing countries collect any revenue. Even if we have all of that, can we deliver good results? If I’m the United States, and I send a representative from the IRS or Treasury to this meeting, what can that representative promise to other countries? What can they deliver? You can’t control a democracy. There are limits on what this U.S. representative could guarantee.

Recognition of this constraint on the ease of establishing successful cooperation leads to a related observation. Many of the

problems underlying the picture of evasion and avoidance today, we, the United States, have created. Just to give an example, recall the check-the-box rules as applied in the cross-border context. The United States said, “Taxpayers, given that sometimes you have been able to achieve the entity classification that you want, perhaps we should just let you directly choose from the outset. Check a box and tell us whether you want to be a corporation, partnership, or a disregarded entity. *You* decide. It’s up to you.” And the planning potential for that, internationally, has just been, well, glorious. At least if you are among the entities relying substantially on check-the-box and hybrid entities for tax planning. But check-the-box is disastrous if you’re trying to collect revenue. We, the United States, control that entirely; we could change it if we wanted. But in the context of a global discussion of cooperation, could our hypothetical representative to the international conversation make that kind of promise or commitment? No. Congress would need to be on board, and the IRS and Treasury cannot guarantee that result.

There are other examples of the constraints that the democratic process places on the ability of countries, including the United States, to commit internationally to key tax changes. Itai already talked about information exchange. If you are trying to find out who is hiding money in international banks, you can start to exchange information. We want all these other countries to give us information, right? Great, well, what do you think they want? Maybe information on their own citizens who are hiding money here? We have problems doing that. We’re not currently set up to be able to make our banks collect all of that information. We can’t turn it over, or we’re not doing it. Our representative to this willing, international organization, if that’s the format we envisioned, couldn’t promise that our legislature is going to make that complete exchange of information work.

Think about the Swiss banking scandals, with which we’re very familiar. I think these scandals really did give international tax the global excitement it now has. The Swiss are famous for bank secrecy. One of the things I gradually came to understand over time, particularly with my Swiss tax colleague, is the degree to which Swiss banking secrecy had a powerful domestic constituency not directly connected to the banking sector. That is, we in the United

States (and globally) think of Swiss banking secrecy as a tool of the Swiss banks to collect clients around the world. And that's certainly true—bank secrecy provides great value added to the client. But what I didn't understand or appreciate was the separate role bank secrecy played domestically in Swiss political and social culture. During the late 2000s, as the Swiss government was trying to work through a solution with the United States to address U.S. tax evasion facilitated by or through Switzerland, the Swiss had to deal with their own democracy. They had to deal with their own legislative structure and their judicial system's response to the deal put in place by the Swiss government.

And so even if you get some countries to the table and they send a representative, what can those representatives actually deliver? I think the ability to meaningfully commit to steps requiring notable domestic legislative change is a continuing problem as we contemplate any international action, but certainly international tax agreements. As a representative, asserting that *you* want a multilateral solution gives the impression your country will be acting as a monolith. But really, that is ignoring the fact that, underneath, you are a democracy with a huge, messy, and very interest group-driven legislative process you must confront.

LEE SHEPPARD: I want to go back to what Allison said about two different problems. As Americans, we can only talk for the United States, although I think there are problems elsewhere in the world, too. In the United States, we have huge governance problems. I don't look at everything through the lens of just taxation, either. I write about banking and securities issues, as well, and I just see enormous, enormous governance problems. And when I look at the individual side, which is the tax evasion side, I basically see that as a banking problem and a tax administration problem. Think about the UBS scandal, which was the first bank we caught for tax evasion. The Americans caught them because this guy showed up. If he hadn't shown up, this would all just be a huge lump underneath the rug at the edge of the room. It was embarrassing that he showed up because the IRS was looking the other way. We were not auditing rich people's returns. Rich folks were not reporting their bank accounts. And the only reason we ended up taking extreme measures to combat

this, like you see with FATCA, is because Congress was truly shocked by the extent of the problem.

What's funny—and our other speakers pointed this out—is that our rich people are pretty darn patriotic compared to other countries' rich people, as Itai was alluding. I mean, in other countries, pretty much everyone with two nickels to rub together, or whatever the currency is, has a bank account someplace else and is not fully reporting their taxes. Our rich people are pretty honest. But you're dealing with a Congress where the percentage of senators who do not have passports is pretty high. You're dealing with a Congress that just does not understand that some people, given the opportunity to cheat their taxes, will do it.

My answer is: withhold first, and ask questions later. I think that's where we're going to go with FATCA. If you look at FATCA from the perspective of a banker, who has to—and wants to—comply with it, you realize he'll ask himself, "How am I going to get my rich people's attention? Am I going to call them in and say 'dump that purse on the table, show me if there's any blue passports in there?'" No, I'm going to write them a little letter saying, "Commencing on X date, we will be withholding 30 percent on the payments out of your account, unless you fill out this form." That's the way it ought to work, that's the way it's going to have to work. It's not going there yet because what we put in place in 2010 has to be given the opportunity to fail. It has to have the opportunity to sort of shuffle along until we find something easier to administer. But eventually, we'll get to automatic information sharing and basically threats to withhold. That's the end game, but for now we're going to say, "You must give us this information."

But I also look at this as a banking problem, because Switzerland is a haven for individuals, and it's an enabler for corporations. Countries that are havens and enablers have to be in the banking system and have their payments cleared. To be an enabler, you have to be in the treaty system and you have to have treaties with countries like the United States, Britain, Germany, and France. Basically, if you are a haven or an enabler, you are acting at the pleasure of these other countries, and once they decide to pull the plug on you, they can. So you see, if we really didn't want bank secrecy, we would have pulled the plug on these countries. We have kicked countries out

of the banking system before. We have not kicked countries out of the banking system because of tax evasion yet, but if we wanted to kick somebody out of the clearing system, it could be done. And, you know, we wouldn't need to kick thirty tax havens out of the clearing system. We could just find a little one and kick it out of the clearing system, and then the other ones would straighten up.

I was on television once, and the host asked, "What's the legitimate use of a tax haven bank account?" I said, "To hide money from your ex-wife." And I still believe that. The reason we tolerate this is so people can do things like hide money from their ex-wives and their business partners and whomever else they're hiding money from. That shouldn't be legal either—and it isn't—but, you know, these havens only exist because we've allowed them to be in the system.

When Allison and I were in Scandinavia, we looked at an article about a real company and what their set up was, and we just sat there with our mouths open. We were going, "Wait a minute, this is completely kosher under U.S. law! There's nothing wrong with this under U.S. law. As a matter of fact, it's pretty clean, compared to what some people do!" I think the reason is that, as an internal morality or policy matter, the United States doesn't really have a problem with it. It's just that the United States has a world reputational and political problem with it. But does the United States itself care whether some multinationals pay tax to other countries—or even, when you get down to it, whether they pay taxes to the United States? No, I don't think so.

But other countries, such as China and India (which is in the same posture as China) and Western Europe, are angry about this. Even though a lot of the tax evasion structuring is pretty legal under the systems in Western Europe, those countries will come and challenge you on a particular commission agent or limited risk distributor. They're not happy at all about the structuring. And India and China are not happy about this either. What that basically means is that when Allison says we're currently in a confusing time, I'm looking at the breakdown of the system that permitted this.

We don't know what's going to replace the structures we have now, but we know the end game is going to be about the market countries and supplier countries here not respecting what the enablers

are doing over there. And we know, really, what the end game is going to look like. We have three choices for where that taxable income belongs. Does it belong to the parent? That is, does the United States, as residence country, get to claw it all back to the parent? That was what the old international consensus held: give superior taxing rights to the residence country. But the source country has the first claim on the money, full stop. The original consensus was based on the fact that the United States and Britain were calling the shots.

So that's one choice—but that choice is foreclosed. That is not going to happen anymore. So the only other choices are suppliers versus markets. This is your end game. My bet is that the taxable income is going to the sales markets, through some kind of apportionment to the sales markets. We are about five or ten years before that argument is fully engaged, but we're beginning that argument now. And that's going to be our really "confusing time," because we're looking at the breakdown of an old order and the reentry of a new order.

ADAM ROSENZWEIG: Thank you all very much. It's been a very interesting conversation. The takeaway I keep coming back to is that, if I accept this sort of dichotomy, this taxonomy between evasion on the one hand and base erosion on the other, why wouldn't it be correct to state that unilateral action works for combating evasion and can even lead to multilateral solutions, while base erosion is more complicated?

LEE SHEPPARD: That's kind of what's happening. The surprising thing with FATCA is that it was a drone, which I said in a speech one time, too. FATCA was just a really ugly, unilateral U.S. thing to put out there. But then other countries with proportionally bigger problems said, "All right, we need information, too, so we're just going to get on this bandwagon."

ADAM ROSENZWEIG: So unilateral action, such as FATCA, is just a hammer?

ALLISON CHRISTIANS: I think she called it a doomsday machine. A doomsday machine, where, once it's set in motion, there's no good resolution.

ITAI GRINBERG: My own view is that the 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.

ALLISON CHRISTIANS: I don't think so. Because the other, much more likely result is that the United States wins the tax haven war, and the United States becomes the last tax haven standing.

LEE SHEPPARD: Well, we are a tax haven for a certain group of people. But it's also true that tax havens have certain constituents. A good tax haven not only has to be small, but it has to be close to the customers, because you have to be able to go visit your money. That's why the Europeans bank in Switzerland and Liechtenstein, the Chinese bank in Singapore, the Americans bank in the Caymans, and the Latin Americans bank in Miami and Texas. But can the United States comply with its own FATCA? Is the United States going to give up information on bank accounts in Texas and Miami to South American governments?

ITAI GRINBERG: The United States got pushed really hard on this question, and it's an obvious question for foreign sovereigns to push on in the context of intergovernmental agreements. It produced a couple responses. First, the United States previously only provided what's called "bank deposit interest information" to Canada, and we've now changed our regulations to let us provide that information to everybody. Second, the first five countries the United States talked to were Germany, the United Kingdom, France, Spain, and Italy, as a group. These countries aren't pushovers, and this resulted in a

political commitment in the documents to get to fully reciprocal exchange. This led to the unusual phenomenon of the Deputy Assistant Secretary for International Tax Affairs getting up on panels, with her European colleagues sitting next to her, and saying there was a political commitment by the administration to get into full reciprocity. So I wouldn't be so confident that there isn't a limit to the hypocrisy sovereigns can engage in, even a really strong sovereign. And I think you'll see that play out.

DIANE RING: But how much can the IRS or Treasury really deliver? To the extent we are talking about changing regulations, that would be within their purview. But they cannot change anything at the Congressional level. The most they can do is try to put pressure on Congress. But what has changed regarding these issues of evasion and avoidance that makes the likelihood of change at the Congressional level now more plausible?

ITAI GRINBERG: This is a great point. We don't have a parliamentary system, which makes a big difference. But you shouldn't think that no country has a parliamentary system. In fact, we're the outlier. In most countries, when the representative shows up at the OECD and says, "We will do something," they mean, "We will put it in the budget and it will pass our parliament." Obviously, the United States cannot do that, and that creates some complexity. But I can see a variety of paths to mounting the sort of political pressure in the United States necessary to overcome this issue.

MICHAEL LENNARD: Sometimes getting the other countries on board will actually help. I'm not sure that will work in the United States, but sometimes by promising something, we can create expectations, which can actually make the thing that we want happen. The problem is, it's a high-stakes game here.

ITAI GRINBERG: Look at the United States' actions on the question of beneficial ownership in the context of the International Financial Action Task Force. You might suggest that a lot of people in the United States were concerned about the beneficial ownership problem in state law, and have been happy to see the United States

take criticism in that regard. Part of the reason is that these are fair criticisms, but it also seems there is utility, in terms of domestic political dynamics, in having international norms with respect to which the country is not fully compliant.

MICHAEL LENNARD: There is, but there's also utility in having a forum where you can be criticized. Often, individual delegates say, "Actually, I agree with them, but I can't officially say that." So it's sometimes quite useful to come back home bringing criticisms you can pass on.

ALLISON CHRISTIANS: I'm actually very encouraged. The more the United States commits itself publicly, the more it creates those expectations, and you think there's got to be a deliverable. What really has happened so far is that you have an intergovernmental agreement (IGA) that is currently in force with Mexico. This IGA is, in name, a reciprocal information exchange agreement under which Mexico agrees to implement FATCA with respect to Mexican institutions, and the United States agrees to gather some tax information relevant to Mexico from U.S. institutions, and that it is "committed" to exchanging information with Mexico. But the domestic regulations that would enable the United States to meet this commitment clearly state that the IRS is not compelled to exchange information—that the United States unilaterally reserves the right to not share if it decides there are concerns regarding the use of the information or if other factors exist that would make exchange inappropriate.¹ So this is an agreement in force whereby the United States is going to be collecting information on Mexican account holders and might, if it decides—in its sole discretion and without review or input of the other country—that the conditions are appropriate, hand that information over to Mexico. Is that happening? It's absolutely not happening yet, but is it likely to happen? There is a lot of resistance to gathering and sharing information on foreign account holders on the part of U.S. banks. In fact, there is a lawsuit occurring right now to prevent this, brought by the Texas and Florida

1. See Treas. Reg. §§ 1.6049-4(b)(5), 1.6049-8 (2014).

Bankers Associations. Treasury's response in a motion for summary judgment reiterates that the regulations do not require the Service to exchange information, automatically or otherwise, with any or every foreign country.²

LEE SHEPPARD: There's a discretionary clause in our agreements that says if we think the account holders will be endangered in their own country, we won't hand over the information. So what's really going to happen—and Mexico is a test case—is we are sometimes going to fold our arms and refuse to give bank account information to Central and South American governments on the ground that all their rich people will be endangered in their own countries. If we do that, we are basically saying, “We don't trust your government to behave properly and responsibly with this information.”

ITAI GRINBERG: I think we'll exchange with Mexico.

LEE SHEPPARD: Yes, and we do exchange some information with Mexico. But it's kind of in batches, and it's only corporate transactions. But the other thing about bank deposit interest is that it is about an individual who directly holds an ordinary bank account. That is not the way sophisticated rich people hold their money. That's really the dumb money, so why are we talking about only that? We have the precedent with Canada, for one thing. But for another, we are also only talking about that because we are only going to give up as much information as the Europeans give up among themselves. The Europeans have a savings directive where they sometimes just collect money from Switzerland without getting any information, and sometimes they get information. But they're only doing it for the dumb money. They're only doing it for directly held bank accounts. They're going to rewrite their savings directive to get on all these vehicles that rich people hold their money through, but they haven't finished doing that yet. They started doing that five years ago, and they're still working through it. When they finish doing that, there

2. See generally *Florida Bankers Ass'n v. U.S. Dept. of Treasury*, No. 13-529, 2014 U.S. Dist. LEXIS 3521 (D.C. Jan. 13, 2014).

will be pressure on us to start looking through Delaware trusts and Nevada corporations and all these naughty little nameless things we have available to foreigners and to our own people in the United States. It's this kind of funny little game between the United States and Europe that's like, "We can't be giving up any more information than they're giving up."

ALLISON CHRISTIANS: The mantra is that "we can't act alone. We have to only work in concert."

LEE SHEPPARD: If you went to Congress and said, "We have to give up Delaware trust information," Congress would say, "Well, what are we getting from them?" The weird irony from that whole competition is that it's not like French people are hiding a whole lot of money in the United States. They could. They could go in through the Cayman Islands and they could hide money in the United States if they wanted. But that's not their big hiding place. So we're dealing with the Western Europeans. We both have problems, but we don't really have those problems with each other. That's the goofiness with bilateral solutions! Bilateral is kind of dumb in that it is premised on equal bargaining power; but you don't have a meeting of the minds when the United States signs a tax information-sharing agreement with the haven because the haven doesn't *need* any information from the United States. So you really have got to go to *multilateral* options and withholding mechanisms. We have to learn to stop clinging to the bilateral approach, which is the way we've always done things. We need to move on.

ADAM ROSENZWEIG: That leads me to the next question. Thinking about it just in a very simple bilateral circumstance, why aren't the incentives to cooperate the same when there are five countries instead of two? Why don't all five say, "None of us like this because there's free money on the table. Let's all sit together and divvy it up?" One would think the bilateral model easily extrapolates to a multilateral one. So why has that not been the case?

ITAI GRINBERG: First of all, you have the residence-source conflict. That's the traditional explanation. Second, you have the

intermediary jurisdictions that are not incentivized to see this change. So you have to figure out a number of things: whether you're allocating the revenue to a source country or residence country, and based on what rubric, and you have to take account of the fact that for some jurisdictions, the status quo is just fine. These are not just traditional tax havens, thought of as islands in the Caribbean; they're mostly jurisdictions with a pretty broad sense of tax-free relationships.

There is a more complicated dynamic in terms of reaching a resolution, because you have to agree on what the problem is, and then once you agree on the problem, which I think to some degree we have done, at least at the G-20 level, you then have to decide how to solve it. One of the few things that both the Administration and the House Ways and Means Committee appear to agree on is that you need measures to address base erosion. So you see that in [Representative Dave Camp's] draft proposal,³ and you also see that in the Administration's minimum tax, and in some sense, they're not all that different. But both of them are residence-country solutions, whereas the rest of the world describes base erosion and profit shifting as a source-country base-stripping problem. And so you immediately see some of the tension arising there.

And among the countries that describe it as a source-country problem, there are a lot of source countries with different opinions, especially those with big, developed economies, who think of themselves as source jurisdictions. Some people have some very different ideas about what the new pragmatic compromise should be, and it's hard to resolve that because it's going to be just another pragmatic compromise.

DIANE RING: To me, it was really striking. I think actually solving the problem of hidden bank accounts seems so much easier. After the past day and a half, I feel very comfortable. I see that this will actually work itself out within my lifetime. But regarding the differences between source and residence, I am not sure that we are

3. See Press Release, Committee on Ways and Means, Camp Releases International Tax Reform Discussion Draft (Oct. 26, 2011), available at <http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=266168>.

going to have any solution. Just to give an example, what is it that a country actually thinks? What clear vision does it seek to pursue? Consider the United Kingdom. Over the summer and fall, the public press was reporting British outrage over multinationals avoiding United Kingdom tax laws—these were mostly U.S. corporations, but some were from the United Kingdom itself. And then there was a potential boycott of Starbucks. Virtually overnight, Starbucks, in response to customer pressure, decided to voluntarily pay more taxes. Very interesting. Based on a roundtable I went to the next day, we concluded it was unlikely to be creditable because it was a voluntary payment.

ALLISON CHRISTIANS: But it could be deductible if it was a charitable donation.

DIANE RING: I'm not even going there.

LEE SHEPPARD: It would be a business expense.

ADAM ROSENZWEIG: It would be deductible, not creditable.

DIANE RING: But why is this point about the United Kingdom and Starbucks relevant? At the same time, the United Kingdom was experiencing the culmination of its transformation into a wonderful place to be a multinational: "You want your patent box? We have got a great patent box! You want controlled foreign corporation rules that are even better than the last time you looked? They are revised and taxpayer friendly! You want a tax rate that is really attractive? We've got it!" I went down the line with each of these changes to the United Kingdom's tax rules governing cross-border transactions, and I was floored. I would not have believed it if I had not sat through a presentation from a U.K. tax person outlining the changes and been able to question him on it. I asked, "You don't actually think you're collecting any revenue?" And he said, "We know we're not." What the United Kingdom did at the same time as it implemented these international tax changes was raise the individual rate. I walked away with so many problems in my head, one of which was, "Who is the United Kingdom?" Not only do I not know who we (the United

States) are (because I already knew I didn't know that), but now I have no idea who the United Kingdom is, much less any of those other countries! So I don't know what this cooperation conversation is going to look like.

LEE SHEPPARD: I think the problem is those countries I've called the "enablers." One of the interesting things about the enablers, especially when they go into treaty negotiations with the United States, is that they have a very clear idea of who they are. The Dutch have a very clear idea that they are an enabler. They're intent on preserving enabler status, and when they go into a treaty negotiation, they've got a shopping list of stuff they want. Then, the United States says, "We can't have companies inverting—changing the residence of their parent company—into your country!" And in 2002, the Dutch sort of folded their arms and said, "What's it worth to you?" What I love about the OECD is that it has a project about this, which makes the Dutch very nervous, although it's not clear that it's going anywhere. The British are best understood as a gigantic banking and hedge fund haven and a haven for rich people who get their investment income from outside of Britain.

They are kind of schizophrenic, but on the tax issue, they've basically decided that we can't have our companies converting into Ireland, so we're going to turn ourselves into a giant haven, and we're going to try to get the rest of the revenue we need out of what's left of our own people. But what that also points to is the question of, as Adam says, why don't these other countries have an interest in having a little sit-down with the enablers and increasing the efforts to get some of them to raise their tax rates? So far, things like that have not worked.

ITAI GRINBERG: Lee makes some profound points that I think are interesting to reflect on. First of all, there is this question about whether the United Kingdom wants to be like a regional principal company headquarters jurisdiction, and I think there are lots of reasons to think that they do. But the United Kingdom has sixty million people. Earlier, people talked about how you have to be kind of small to be a regional principal country center. I don't think that's true; you can be relatively large. There are a fairly small number of

countries—the United States and just a few others—that are regions rather than potential headquarter jurisdictions, and that’s a big deal when you think about the global dynamics.

The second thing is that we have a multilateral project that helped get us to the race to the bottom, and it’s called the European Court of Justice. When you think that multilateralism is the solution, you should recognize there are unintended consequences to structures that you build, and you should ask yourself, “Where would we be today if the European Court of Justice hadn’t decided that the imputation regimes that Europe was moving towards weren’t compliant with EU law?” We might have had a very different debate about what a competitive business tax looked like. It might have been a tax that taxes business income once but only once, has an imputation regime, and, maybe, doesn’t treat foreign shareholders the same way as domestic shareholders. That would be a very different conversation, and there would be pros and cons to it, but it might not be as troublesome as the one we have today.

ADAM ROSENZWEIG: I think what’s coming out of this discussion is that there are no neutral choices. Every choice has both efficiency and distributive consequences. The question is: Is this a system that benefits, say, Luxembourg and the Netherlands over Botswana and Nigeria? Is that what we want from the international tax system? Or is the goal to actually affirmatively take distribution into account as a built-in cost?

ITAI GRINBERG: “Should” from whose perspective, right? If I’m the United Kingdom, the goal that I have, and the best project, perhaps, is to make sure any principal country that is more attractive than the United Kingdom is violating the new international norms in one way or another. That’s a reasonable goal to have. It’s not necessarily their goal, but it would be a reasonable goal to negotiate for. So on whose behalf do I speak when I say “should”?

MICHAEL LENNARD: It’s very complex, because there’s no pure source country or pure residence country; most countries tax to some degree both on a residence or source basis. And I think in the current climate, with everyone desperate for money, they don’t actually want

to give anything up either. I think that's part of the problem. But then, in the United Kingdom case, for example, it's also complicated because you've got the digital economy and you've got High Street stores that are failing—I think there were three closures in the first month of this year. And there's a lot of pressure on them that goes, "We've got the bricks and mortar, we've invested in this country, we cannot compete with digital providers." There are so many pressures from these entities, and the government will need to create a result that looks good to that constituency and to the public, which is suffering after budget cuts. So it's going to be very difficult for them to come out with a result that is satisfactory for all three, let alone something that will satisfy all countries. Unless you end up with what I sometimes call the "Mission Accomplished" flag—that is to say, unless you end up with something that everyone can accept as satisfying the need for a "success," so they can just go away and implement the minimal agreement in their own way. That would be a sad result, but it is possible. "Success" can simply be redefined.

ADAM ROSENZWEIG: So then the question is: Who is "us"? Who are "we"? And then that's really pushing on why the OECD seems to be struggling, because the "we" is the relatively rich countries, so it's not surprising that whoever is not an OECD member is not going to like whatever the OECD proposes. So what's the path to a multilateral solution if the so-called enablers don't want to join? Wherever you close the membership ranks, the next person's going to be unhappy, right? So what's the way out? Or maybe, like Diane said, we can't envision a way out of this mess.

LEE SHEPPARD: A lot of us who like the idea of formulary apportionment as the ultimate solution look at the breakdown of this system, which was predicted in 1986, when the U.S. Congress tried to strengthen the transfer pricing rules. We started with the states that had formula apportionment among themselves. The world is going to go the way of the states in adopting formulary apportionment, plus economic nexus. If you are selling over the computer lines into our country, selling digital books or something, you're paying a sales tax. The world is going there eventually. But I am not depressed, because I am seeing the breakdown of a silly system—because this structure

here, this is a twenty-year-old structure. This system has been flawed for years. It's just only recently that countries are waking up and getting really annoyed by it.

ALLISON CHRISTIANS: And it's not just countries. NGOs are waking up, too.

LEE SHEPPARD: There's nothing like a couple of bricks through a shop window to get people's attention. And there's nothing like being in a consumer products business, where you don't want bricks through your shop window, to get people's attention. So we'll see the breakdown of this system eventually. We can't identify a source for intangibles or financial services income like we used to be able to do fifty years ago for metal mashing income. And that means you have to apportion it, ultimately. Right now, we apportion trading book income of big investment houses that pass their trading books around between Hong Kong, London, and New York, overnight. We apportion that income. We are eventually going to have to apportion the intangible income. We are eventually, on the individuals' side, going to share information—or withhold, or something like that—and what we're looking at now is the beginning of a really painful, ugly process of getting there.

ADAM ROSENZWEIG: I think what we've seen here is that there are no simple solutions, yet, at the same time, there's no clear way out, in terms of directions and institutions. Rather, this is going to have to be hammered out issue by issue, case by case, as we start building a new worldwide consensus. In some ways, that's very exciting. It's the first time in over ninety years that we're actually seriously thinking about a new worldwide international consensus. Still, there's no clean, pretty way out of our current debacle.

I would like to thank our panelists very much. It's been a very interesting and engaging conversation, and we'll have to wrap it up there. Thank you very much.