TAXING EXCESS OIL AND GAS PROFITS FOR CLIMATE CHANGE LOSS AND DAMAGE

by Myanna Dellinger

Myanna Dellinger is Executive Director of the EinStrong Foundation, and was a tenured law professor teaching business law and public international law for a decade.

It is beyond reasonable dispute that climate change is already taking a toll on nations around the world. In supranational legal and economic discussions, it is also well known that many nations that already suffer great injury from rising temperatures are typically not the ones who caused the problem. The culprits, historically, are developed nations. Unless it is the case that developed nations simply do not care about the problems we have caused for less financially able nations—an argument that, hopefully, no one is willing to make or accept—*somebody* has to pay for the climate change damage bestowed by rich countries on emerging economies.

This Comment applauds the step forward witnessed at the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) 27 in Egypt in November 2022. For the first time, some developed nations indicated a willingness to voluntarily undertake payments for loss and damage caused by greenhouse gas (GHG) emissions, after years of rejecting such payments. No legal liability was, however, accepted. As liability has been a sticking point for many nations in past loss and damage discussions, this is no surprise. Still, voluntary action in the form of paying into a fund for loss and damage is better than no action, and was applauded as a "first in history" development.[1]

In addition to voluntary action, nations could and arguably should adopt carbon taxation at the national level. Recently, a multilateral agreement was adopted that allows for nations suffering financial injury to levy a tax on products and services consumed in their territories, but sold by companies headquartered in other jurisdictions, as is often the case in today's globalized and often online market. The agreement is known as the Organisation for Economic Cooperation and Development (OECD)/Group of Twenty (G20) Inclusive Framework on Base Erosion and Profit Shifting (BEPS).[2]

This Comment argues that similarly, nations could adopt a multilateral agreement imposing a tax on oil and gas companies earning "excessive profits," as debated recently in the United States. Taxes tend to be politically unpopular unless designed and explained very well. But taxes may, in addition to helping nations in need of financial assistance with climate-induced injuries, help speed up the energy transition needed to combat climate change via crucial signaling and market pricing effects.

Part I of the Comment will review recent national arguments for a tax on "excess profits" to be distributed within the United States. Part II then examines new purported agreements to help pay developing nations for loss and damage caused by developed nations. Against that background, Part III presents the OECD/G20 BEPS Project as an example of how nations have agreed to share tax revenues in a more equitable manner than was the case, by transferring taxation bases to nations in which products and services are used, not where producers are headquartered; and contrasts that—analyzing U.S. political rhetoric and potential taxation rates—with how, similarly, nations could agree to tax "excess profits" and transfer such funds to nations suffering loss and damage caused by climate change.

Part IV calculates the approximate amount of revenue that such a tax hypothetically could raise. Granted, these amounts may not yet be sufficient to remedy all loss and damage, but may constitute the start of a subsequently increasing international tax payment system that alleviates some of the financial burdens on *nations* to pay for loss and damage and, instead, shifts this to the *corporations* who, after all, knowingly caused the damage. Such taxation would by nature be forward-looking, and thus not address past corporate behaviors other than the recognition, even by corporations themselves, that their products cause physical and financial injury to peoples and nation states.

A possible international tax treaty could also be framed in such a way that, consistent with national resistance toward legal liability for past actions, corporations would not be considered liable for past contributions to climate change via the treaty. That may make nations in which oil and gas companies are headquartered or otherwise situated more likely to adopt the treaty. In other words, legal liability for past action remains a contested point that should be

1. *COP27 Ends With Announcement of Historic Loss and Damage Fund*, U.N. Env't Programme (Nov. 22, 2022), https://www.unep.org/news-and-stories/story/cop27-ends-announcement-historic-loss-and-damage-fund.
2. OECD/G20 BEPS Project, Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy 3 (2021), https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [hereinafter Two-Pillar Solution].

closely considered by the drafters and other specialists in this context. One of two legal avenues could be taken: the text could simply not address the issue of liability of past contributions to climate change and thus leave the issue open for future interpretation and/or development. Alternatively, the text could offer immunity from future liability schemes as the quid pro quo for adopting the tax. The latter may be seen as controversial by some actors who are seeking precisely to have nations impose some sort of legal liability for past actions (including on the nations themselves).

Part V briefly examines equitable and national "insurance" reasons for supporting a new international tax treaty on the record-breaking excess profits earned by oil and gas companies in many different nations. Part VI concludes.

The Comment does not address coal revenues because the relevant political rhetoric has targeted oil and gas profits only. Further, coal plants are often considered to be phasing out naturally because of cost considerations, at least in the United States.[3] Coal revenues could, of course, be included in any discussions of an international treaty on carbon profits more broadly.

I. U.S. Domestic Excess Taxation Arguments

With sharply rising gas prices in 2022 and record-breaking profits in the oil and gas industry,[4] key political leaders, including U.S. President Joe Biden, have called for "windfall taxes" on "excess profits" among oil companies.[5] Arguing that the sharply rising prices stem from Russia's war against Ukraine, President Biden asked oil companies to ramp up production of gas to curb the price at the pump.[6] If they do not do so, said President Biden,

> they're going to pay a higher tax on their excess profits and face other restrictions. My team will work with Congress to look at these options that are available to us and others. It's time for these companies to stop war profiteering, meet their responsibilities to this country, give the American people a break and still do very well.[7]

Democrats in the U.S. Senate and U.S. House of Representatives, led by Sen. Sheldon Whitehouse (D-R.I.) and Rep. Ro Khanna (D-Cal.), introduced legislation during the spring of 2022 that would tax large oil companies for windfall profits and give the proceeds to consumers as a rebate.[8] In June 2022, Senate Finance Committee chair Ron Wyden (D-Or.) also floated the idea of a 21% surtax on oil production to, among other things, blunt inflation.[9] This tax would be in addition to any regular income tax due.[10] Profits over 10% would be considered excessive under the bill.[11] Companies with more than $1 billion in annual revenue would be taxed.[12]

Unsurprisingly, oil companies defended their approach, claiming that their record-breaking profits are the result of a surge in oil and natural gas prices after Russia's invasion of Ukraine scrambled global energy markets.[13] The industry accused the president of politicking, noting that gas prices fell after the summer 2022 holiday season.[14]

Also unsurprisingly, Republicans fault the president for policies that they consider to be discouraging the energy industry from expanding its capacity, which might help keep down prices.[15] Despite political argumentation, energy analysts have so far dismissed Democratic accusations that oil companies are keeping prices high through anticompetitive behavior.[16]

With the House now under Republican control and the Senate majority held by the Democratic party, it seems unlikely that an excess tax of this order—or any at all—will be adopted before the 2024 elections. However, significant reasons, in addition to potential war profiteering, warrant adoption of a tax on oil and gas producers that politicians in this country and beyond may (too) slowly be coming to realize: the threat of loss and damage claims against this and other wealthy nations for our contributions to worsening climate change to which poorer nations now have to adapt at a rapid pace, without sufficient funds to do so.

Some countries are finally offering to pay what may be seen as "reparations" for climate change damage. But if the burden to pay for climate change damage was placed not solely on nations, but also on companies that produced the damaging product via a tax shifted at the supranational level, two birds could be killed with one stone: nations needing help adapting to climate change the most would obtain such assistance, and the United States and other similarly situated nations could avoid accepting *all* liability for causing climate change loss and damage. Instead, some of the financial burden would be placed on fossil fuel corporations.

3. Leslie Kaufman, *Replacing Coal Plants With Renewables Is Cheaper 80% of the Time*, Bloomberg (May 5, 2021), https://www.bloomberg.com/news/articles/2021-05-05/replacing-coal-plants-with-renewables-is-cheaper-80-of-the-time.
4. William Brangham, *Oil Companies Post Massive Profits as Consumers Feel Squeeze From High Gas Prices*, PBS News Hour (Nov. 1, 2022, 6:40 PM), https://www.pbs.org/newshour/show/oil-companies-post-massive-profits-as-consumers-feel-squeeze-from-high-gas-prices.
5. Peter Baker & Clifford Krauss, *Biden Accuses Oil Companies of "War Profiteering" and Threatens Windfall Tax*, N.Y. Times (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/biden-oil-windfall-tax.html.
6. *Id*.
7. *Id*.
8. Josh Siegel, *Biden Bashes Oil Sector for "War Profiteering," Warns of Windfall Tax on Profits*, Politico (Oct. 31, 2022, 6:06 PM), https://www.politico.com/news/2022/10/31/biden-tax-oil-companies-00064266.
9. Nancy Cook & Laura Davison, *Biden Ally Floats 21% Surtax on Oil Profits to Blunt Inflation*, Bloomberg (June 14, 2022, 2:35 PM), https://www.bloomberg.com/news/articles/2022-06-14/biden-ally-floats-21-surtax-on-oil-profits-to-blunt-inflation.
10. David Shepardson, *U.S. Senate Finance Chair to Propose Tax on Excess Oil Profits*, Reuters (June 14, 2022, 5:25 PM), https://www.reuters.com/business/energy/us-senate-finance-chair-propose-21-surtax-excessive-oil-firm-profits-bloomberg-2022-06-14/.
11. *Id*.
12. *Id*.
13. Siegel, *supra* note 8.
14. Baker & Krauss, *supra* note 5.
15. *Id*.
16. Siegel, *supra* note 8.

This is not unreasonable, given the well-established and decades-old knowledge possessed by such companies of the dangerous nature of their products.[17] In addition to shifting revenue from wealthy corporations and nations to those in need of financial assistance, a well-designed carbon taxation system at the national and supranational levels could, if designed correctly, help discourage the use of carbon products, which is the ultimate end goal. In short, carbon taxation could help speed up the energy transition that the entire world so badly needs.

II. Increasing Calls for Compensation Payable by Nation States

"For 30 years, developing nations have been calling for industrialized countries to provide compensation for the costs of devastating storms and droughts caused by climate change. For just as long, rich nations that have generated the pollution that is dangerously heating the planet [ ] resisted those calls."[18] Perhaps most importantly for signaling reasons and actual damages, the United States—the world's richest nation and largest GHG emitter[19]—resisted talks about liability for damage caused by its historical contributions to what is now amounting to real physical and financial damage.

At the November 2022 COP27 meeting in Egypt, talks returned to the topic of equitable, voluntary payments for loss and damage due to climate change. Early in the meetings, John Kerry, President Biden's climate envoy, agreed merely to "discuss the idea" of financing for loss and damage.[20] This stood in contrast to opinions held by political leaders in the European Union. For example, Ursula von der Leyen—the president of the European Commission—endorsed the idea of new funds for poor nations being affected by climate change. "The COP must make progress on minimizing and averting loss and damage from climate change," she said, addressing other world leaders. "It is high time to put this on the agenda."[21]

At that point, a few other nations had already volunteered to pay damages ("reparations") for past actions. For example, Denmark became the first United Nations Member to agree to such payments.[22] The small nation will direct approximately $13 million to assist vulnerable nations that have already suffered the consequences[23] of the ever-increasing and ever-intensifying droughts, floods, wildfires, storms, food production problems, and other severe weather events that we now know are attributable to human-induced climate change.

Similarly, Ireland has pledged $10 million to a new effort "to protect the most vulnerable from climate loss and damage."[24] Said Irish Prime Minister Micheál Martin, "The burden of climate change globally is falling most heavily on those least responsible for our predicament. We will not see the change we need without climate justice."[25] Austria's climate minister has noted that the country will pay around $50 million to developing countries struggling with climate effects. Belgium joined in, promising $2.5 million in loss and damage funding to Mozambique.[26] Germany pledged $170 million to a new program that would offer vulnerable nations a form of insurance in the event of climate emergencies.[27]

In other words, climate leaders around the world have finally come to recognize that the time has come for real loss and damage funding and not just more empty rhetoric. For example, former Vice President Al Gore has noted that he supports "governments paying money for loss and damage and adaptation, but let's be very clear that that's a matter of billions or tens of billions."[28]

For a long time, "loss and damage funding [was] a rallying cry for climate justice advocates and leaders from vulnerable countries. Wealthy nations, including the United States, [ ] rebuffed those calls, worried that any kind of financial commitment would imply legal liability for climate change's escalating toll."[29] But miracles may still happen. After 30 years of deadlock, developed nations agreed at the very end of COP27 to help pay developing countries for climate change losses.[30] The United States and other wealthy countries had, as mentioned, long blocked the idea, for fear that they could be held legally liable for the GHG emissions that are driving climate change.[31]

Importantly, the new agreement does not purport to hold nations legally liable for payments. Instead, "the deal calls for a committee with representatives from 24 countries to work over the next year to figure out exactly what form the fund should take, which countries should contribute and where the money should go. Many of the other details

17. For example:

> Exxon was aware of climate change, as early as 1977, 11 years before it became a public issue, according to a recent investigation from InsideClimate News. This knowledge did not prevent the company (now ExxonMobil and the world's largest oil and gas company) from spending decades refusing to publicly acknowledge climate change and even promoting climate misinformation—an approach many have likened to the lies spread by the tobacco industry regarding the health risks of smoking.

Shannon Hall, *Exxon Knew About Climate Change Almost 40 Years Ago*, Sci. Am. (Oct. 26, 2015), https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/.

18. David Gelles, *After Decades of Resistance, Rich Countries Offer Direct Climate Aid*, N.Y. Times (Nov. 8, 2022), https://www.nytimes.com/2022/11/08/climate/loss-and-damage-cop27-climate.html.
19. *Id*.
20. Lisa Friedman, *Biden's Message on Climate Might Not Be the One the World Wants*, N.Y. Times (Nov. 10, 2022), https://www.nytimes.com/2022/11/10/climate/biden-cop27-climate-reparations.html.
21. Gelles, *supra* note 18.
22. Sarah Kaplan, *Denmark Becomes First U.N. Member to Pay for "Loss and Damage" From Climate Change*, Wash. Post (Sept. 20, 2022, 6:23 PM), https://www.washingtonpost.com/climate-environment/2022/09/20/denmark-climate-change-un-general-assembly/.
23. *Id*.
24. Gelles, *supra* note 18.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. Kaplan, *supra* note 22.
30. Brad Plumer et al., *In a First, Rich Countries Agree to Pay for Climate Damages in Poor Nations*, N.Y. Times (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/climate/un-climate-damage-cop27.html.
31. *Id*.

are still to be determined."[32] Nonetheless, "[t]he announcement offers hope to vulnerable communities all over the world who are fighting for their survival from climate stress . . . [a]nd gives some credibility to the COP process."[33]

In this context, it is important to recall that only 23 developed countries are responsible for no less than half of the *historical* carbon dioxide (CO_2) emissions.[34] In that category, the United States is responsible for 24.6%, Germany for 5.5%, and the United Kingdom (U.K.) for 4.4%.[35] More than 150 countries are responsible for the other half of global GHG emissions.[36] In that category, China is responsible for 13.9%, India for 3.2%, and Ukraine for 1.8%.[37] In other words, although the United States is *currently* "only" the second-greatest emitter, the United States emitted more CO_2 than any other country to date: around 400 billion tons since 1751, or 25% of the total historical emissions—twice as much as China, currently the world's largest national contributor.[38]

In the United States, CO_2 released by burning oil, coal, and natural gas makes up at least 82% of total GHG emissions (weighted by climate change impact).[39] The remaining GHG emissions consist of methane (9%, from landfills, coal mines, oil and gas operations, and agriculture), nitrous oxide (5%, from burning fossil fuels and certain fertilizers), refrigerants and other "engineered" chemicals (2%), and CO_2 from other sources (2%).[40]

The nation states emitting the most carbon have changed over the years. The top 10 CO_2-emitting countries in the world are listed below along with their 2020 CO_2 output in millions of metric tons.[41]

Clearly, a need for global funding of onsetting loss and damage as well as action halting the underlying problem is in order. No one—neither nations nor corporations—should be able to shirk their responsibilities in this context any longer.

Table 1. Top 10 CO_2-Emitting Countries

Country	CO^2 output
China	11,680.42
United States	4,535.30
India	2,411.73
Russia	1,674.23
Japan	1,061.77
Iran	690.24
Germany	636.88
South Korea	621.47
Saudi Arabia	588.81
Indonesia	568.27

Sources: Wall Street Journal, *Browse Companies,* https://www.wsj.com/market-data/quotes/company-list (last visited Dec. 19, 2022); Statista, *Profit Attributable to Shareholders of Gazprom From 2014 to 1st Half of 2022,* https://www.statista.com/statistics/1122801/gazprom-net-profit-russia/ (last visited Dec. 19, 2022); Macrotrends, *Homepage,* https://www.macrotrends.net/ (last visited Dec. 19, 2022); Vladimir Soldatkin, *Rosneft First Half Profit Jumps to $7.2 Billion Despite Sanctions,* Reuters (Sept. 15, 2022, 4:19 AM), https://www.reuters.com/markets/europe/rosneft-says-h1-net-income-up-13-yy-72-bln-2022-09-15/ (David Evans & Alexander Smith eds.); Yahoo! Finance, *Homepage,* https://finance.yahoo.com/ (last visited Dec. 19, 2022); China Petroleum and Chemical Corporation, Third Quarterly Report for 2022, at 3, 16 (2022), http://www.sinopec.com/listco/en/Resource/Pdf/2022102806.pdf; Investing.com, *CNOOC Ltd. (0883),* https://www.investing.com/equities/cnooc-financial-summary (last visited Dec. 19, 2022).

III. Beyond Voluntary Nationwide Action and Taxation

Climate change poses an increasingly extreme risk to life as we know it.[42] There is still time to halt this, but the window for effective action is closing.[43] It is astonishing that humankind is willing to risk destroying our own existence, not to mention the entire global ecosystem. But instead of lamenting that, we need action including monetary assistance to nations in need. A contribution to at least some of the ongoing loss and damage payment arrangement could come in the form of an international agreement on excess oil profits, transferring some of such profits to the nations that most urgently need assistance. This would alleviate the

32. *Id.*
33. *Id.*
34. Nadja Popovich & Brad Plumer, *Who Has the Most Historical Responsibility for Climate Change?, N.Y. Times* (Nov. 12, 2021), https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html [https://perma.cc/AA56-UHYF].
35. *Id.*
36. *Id.*
37. *Id.*
38. Hannah Ritchie, *Who Has Contributed Most to Global CO_2 Emissions?,* Our World Data (Oct. 1, 2019), https://ourworldindata.org/contributed-most-global-co2 [https://perma.cc/93P5-2GWF].
39. Carbon Tax Center, *FAQs: Frequently Asked Questions and Answers About Carbon Taxes and the Carbon Tax Center*, https://www.carbontax.org/faqs/ (last visited Dec. 19, 2022) [https://perma.cc/K68P-G62N].
40. *Id.*
41. World Population Review, *Carbon Footprint by Country 2022*, https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country (last visited Dec. 19, 2022).
42. Press Release, Intergovernmental Panel on Climate Change, Climate Change: A Threat to Human Wellbeing and Health of the Planet. Taking Action Now Can Secure Our Future (Feb. 28, 2022), https://www.ipcc.ch/site/assets/uploads/2022/02/PR_WGII_AR6_english.pdf; *Climate Change and Health*, World Health Org. (Oct. 30, 2021), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health; City of Chicago, *Climate Change Impacts*, https://climatechange.chicago.gov/climate-impacts/climate-impacts-human-health (last visited Dec. 19, 2022).
43. Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 18, 20-21, 41, 44, 48-49 (Priyadarshi R. Shukla et al. eds., Cambridge Univ. Press 2022), https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf.

pressure on nations to pay for all on-the-ground damage, and thus run the undesirable risk of being held or considered to be legally liable for past and current contributions to climate change.

Needless to say, adopting taxes and transferring the revenue to other nations is likely to be subject to intense political and popular resistance. The fossil fuel industry itself would very likely also resist having to pay more taxes of any kind. However, the truth of the matter is that progress simply has to take place now whether or not the fossil fuel industry, which ultimately influences politics and popular opinion greatly, resists such action.

Oil and gas companies have made and continue to make exceptionally good profits off what we now know are exceptionally destructive products and services. They could be charged with paying taxes to nations experiencing loss and damage. Such taxes could be levied on their current and future profits without taking into account their *past* actions. Nations can and should also pay loss and damage funds alongside potential corporate-level revenue-shifting. A relevant tax treaty can be drafted and implemented relatively easily based on similar developments in the online international business taxation arena, which will be analyzed next.

A. The OECD/G20 BEPS Project

In October 2021, 136 countries and jurisdiction members of the OECD/G20 Inclusive Framework on BEPS—representing more than 90% of global gross domestic product (GDP)—joined the "Two-Pillar Solution," establishing a new framework for an international tax, and agreed on a detailed implementation plan to enter into force in 2024.[44] The background is as follows:

> Digitalisation and globalisation have had a profound impact on economies and the lives of people around the world, and this impact has only accelerated in the 21st century. These changes have brought with them challenges to the rules for taxing international business income, which have prevailed for more than a hundred years and resulted in MNEs [multinational enterprises] not paying their fair share of tax despite the huge profits many of these businesses have garnered as the world has become increasingly interconnected.[45]

Thus, the agreement is designed to ensure a fairer distribution of profits and taxing rights among countries to compensate for financial injury caused by the previously lacking ability to levy tax on products and services used in certain nations, but sold by corporations headquartered in other nations. The largest MNEs are the "winners of globalization,"[46] and ought indeed to pay taxes to nations that cannot, under existing tax rules, levy such taxes. "Large MNEs are able to earn significant revenue in foreign markets without those markets seeing much, if any, tax revenue as a result."[47] The Members of the agreement are collaborating "to put an end to tax avoidance strategies that exploit gaps and mismatch in tax rules."[48]

The OECD has estimated that corporate tax avoidance costs anywhere from $100-240 billion annually, which corresponds to no less than 4%-10% of global corporate income tax revenues.[49] This, of course, is an unfair injury to nations who would have earned such income in bygone years where taxes were paid much more locally than in today's extremely globalized market.

The agreement consists of two "pillars." Pillar One aims to ensure a fairer distribution of profits and taxing rights among countries with the largest MNEs. The targeted companies are MNEs with a global turnover above 20 billion euros and a profitability above 10%.[50] This "revenue sourcing" rule will permit the allocation of "Amount A" to a market jurisdiction when the in-scope company derives at least one million euros in revenue.[51] For smaller jurisdictions with GDPs of less than 40 billion euros, the nexus requirement will be set at 250,000 euros.[52] Amount A will, in other words, be reallocated to the market jurisdictions where the MNE's users and customers are located.[53]

Pillar Two then puts a floor on tax competition on corporate income tax through the introduction of a global minimum tax of 15% on all MNEs with a global turnover of above 20 billion euros.[54] There will also be a

> [r]equirement for all jurisdictions that apply a nominal corporate income tax rate below 9% to interest, royalties and a defined set of other payments to implement the "Subject to Tax Rule" into their bilateral treaties with developing Inclusive Framework members when requested to, so that their tax treaties cannot be abused.[55]

Of course, other legal requirements and details apply to both pillars.

The revenue impact is expected to be as follows: "taxing rights on more than $125 billion of profit are expected to be reallocated to market jurisdictions each year. With respect to Pillar Two, the global minimum tax rate of 15% is estimated to generate around $150 billion in new tax revenues globally per year."[56] One single entity will admin-

44. Two-Pillar Solution, *supra* note 2.
45. *Id.*
46. *Id.* at 4.
47. *Id.* at 12.
48. *Id.*
49. *Id.* at 13.
50. *Id.* at 4, 6; OECD/G20 BEPS Project, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy 1 (2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf [hereinafter Statement].
51. Statement, *supra* note 50, at 1.
52. *Id.*
53. Two-Pillar Solution, *supra* note 2, at 4-5.
54. *Id.* at 6.
55. *Id.* at 4.
56. *Id.* at 5.

ister and seemingly enforce this agreement for streamlining purposes.[57]

Many nations that are, incidentally, also significant fossil fuel-producing and -consuming nations are Members of the existing BEPS. These include Brazil, Canada, China, Germany, India, Ireland, Norway, Qatar, Saudi Arabia, Switzerland, the United Arab Emirates, the U.K., and the United States.[58] Russia was suspended.[59] Some major natural gas- and coal-producing nations such as Iraq and Iran are not.[60]

B. New Tax Revenue-Shifting Agreement

Based at least on U.S. calls for taxation on excessive profits that oil and gas producers arguably make today, the need to pay loss and damage funds to nations injured by historical and current GHG emissions, and the deterrent on further oil use that carbon taxation may present, a new agreement could be executed by the very same Parties—and hopefully others—as currently agree to compensate nations for the loss of tax income stemming from globalization and Internet commerce. There are now 142 Nation State Members of the OECD/G20 Inclusive Framework on BEPS. The reasoning and implementation would be as follows: Many nations are suffering greatly from both financial and on-the-ground injury caused by climate change. At the same time, many companies around the world claim interest in an energy transition.

For example, BP states that "[t]o get to net zero, we'll need governments, companies and consumers to work together to accelerate meaningful action. That's why bp is advocating for policies that can help bp, and the US, achieve our shared net zero ambition."[61] If such claims are sincere and not just meaningless rhetoric at best and deliberate "greenwashing" at worst, corporations should welcome the chance to imminently contribute to real assistance and steps in the right direction in the near future. This does not even mean holding corporations liable for past damage, which has otherwise been discussed in several legal contexts.[62]

Imposing a tax on oil and gas companies to help compensate nations for their damaging actions is of course not going to be popular. For example, in late December 2022, Exxon Mobil Corp. announced that it is suing the European Union to force the bloc to give up its new windfall tax on oil corporations.[63] Nor is it going to be easy. However, it will not come as a surprise to these companies that such a tax may be levied on them. They have, as mentioned, been aware of the climate change-causing nature of their actions for decades. Nonetheless, very few companies have to date volunteered to individually pay nations for the damage stemming from their products and services. Many more are unlikely to do so. But nations could force them to take such action via a treaty similar to the OECD/G20 Inclusive Framework on BEPS.

The type of revenue that could be shifted via an international excess profit tax on oil and gas companies will be examined next.

IV. The Figures

To calculate approximate, albeit hypothetical, amounts under an international agreement to tax excess profits on oil and gas companies, the author used 12-month results through September 2022 where available. If such figures were not available, 2021 figures were used as indicated. Interim quarters were used for Gazprom, Rosneft, and China National Offshore Oil Corporation (CNOOC). Currency conversions were performed on or around November 29, 2022. (See Table 2 next page.)

Following the OECD treaty of taxing companies with profit margins above 10% and revenues exceeding 20 billion euros (approximately $20.8 at the exchange rates in force on November 24, 2022), but at 21% in similarity with U.S. proposals, not the "minimum 15%" under the OECD plan, the tax revenue that could be derived annually would be as follows (in billions of $). (See Table 3 on page 10111.)

$61 billion will not even cover all the costs bestowed upon developing nations, the ones that are the least able to pay for the climate change historically caused by developed nations. In fact, far from it. For example, one estimate shows that they will need hundreds of billions of dollars *annually* to adapt to the warming that is already inevitable.[64] But an international excess tax treaty on oil companies would be a start. The tax rate could be increased. More nations could be included voluntarily or by design.

Perhaps most importantly, such taxation could function as yet another signal to fossil fuel-producing and -distributing companies that their current-form operations must cease. If they will transition away from their current activities and find sustainable profit-making income streams (and most appear not to be genuinely interested in doing

57. *Id.* at 7.
58. OECD, Members of the OECD/G20 Inclusive Framework on BEPS (2022), https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.
59. *Id.*
60. *Id.*
61. BP, *Getting to Net Zero: Climate Advocacy in the US*, https://www.bp.com/en_us/united-states/home/who-we-are/advocating-for-net-zero-in-the-us.html (last visited Dec. 19, 2022).
62. *See, e.g.*, Bruce Gil, *U.S. Cities and States Are Suing Big Oil Over Climate Change. Here's What the Claims Say and Where They Stand*, PBS (Aug. 1, 2022), https://www.pbs.org/wgbh/frontline/article/us-cities-states-sue-big-oil-climate-change-lawsuits/.
63. Sabrina Valle, *Exxon Sues EU in Move to Block New Windfall Tax on Oil Companies*, Reuters (Dec. 29, 2022), https://www.reuters.com/markets/commodities/exxon-sues-eu-move-block-new-windfall-tax-oil-companies-ft-2022-12-28/.
64. Jocelyn Timperley, *The Broken $100-Billion Promise of Climate Finance—And How to Fix It*, Nature (Oct. 20, 2021), https://www.nature.com/articles/d41586-021-02846-3; Press Release, United Nations Environment Programme, Step Up Climate Change Adaptation or Face Serious Human and Economic Damage—UN Report (Jan. 14, 2021), https://www.unep.org/news-and-stories/press-release/step-climate-change-adaptation-or-face-serious-human-and-economic.

Table 2. Leading Oil and Gas Companies Worldwide (in Billions of $)

Company and nation	Revenue	Net income (profit)	Profit margin*
Gazprom, Russia	Year 2021: 166.9	Year 2021: 33.9 Six months ending June 2022: 41.8	20%
Petrobras, Brazil	12 months ending Sept. 2022: 118.3	12 months ending Sept. 2022: 34.0	29%
ExxonMobil, United States	12 months ending Sept. 2022: 403.3	12 months ending Sept. 2022: 51.9	13%
Shell, UK	12 months ending Sept. 2022: 375.2	12 months ending Sept. 2022: 43.4	12%
Chevron, United States	12 months ending Sept. 2022: 237.9	12 months ending Sept. 2022: 34.2	14%
TotalEnergies SE, France	12 months ending Sept. 2022: 236.1	12 months ending Sept. 2022: 21.4	9%
Rosneft, Russia	Year 2021: 135.2 Six months ending June 2022: 61.7	Year 2021: 14.5 Six months ending June 2022: 7.2	11%
PetroChina, China	12 months ending Sept. 2022: 476.0	12 months ending Sept. 2022: 20.9	4%
Lukoil, Russia	Year 2021: 150.3	Year 2021: 12.6	8%
ConocoPhillips, United States	12 months ending Sept. 2022: 78.9	12 months ending Sept. 2022: 18.1	23%
Sinopec, China	12 months ending Sept. 2022: 443.2	12 months ending Sept. 2022: 10.9	24%
Equinor, Norway	12 months ending Sept. 2022: 130.2	12 months ending Sept. 2022: 21.4	16%
CNOOC, China	Year 2021: 37.6 Nine months ending Sept. 2022: 39.9	Year 2021: 10.9 Nine months ending Sept. 2022: 13.9	29%
Eni S.p.A., Italy	12 months to Sept. 2022: 139.6	12 months to Sept. 2022: 18.1	13%
Reliance Industries Ltd., India	12 months to Sept. 2022: 102.5	12 months to Sept. 2022: 8.2	8%

* Profit divided by revenue.

Sources: Wall St. J., *Browse Companies*, https://www.wsj.com/market-data/quotes/company-list (last visited Dec. 19, 2022); Statista, *Profit Attributable to Shareholders of Gazprom From 2014 to 1st Half of 2022*, https://www.statista.com/statistics/1122801/gazprom-net-profit-russia/ (last visited Dec. 19, 2022); Macrotrends, *Home Page*, https://www.macrotrends.net/ (last visited Dec. 19, 2022); Vladimir Soldatkin, *Rosneft First Half Profit Jumps to $7.2 Billion Despite Sanctions*, Reuters (Sept. 15, 2022, 4:19 AM), https://www.reuters.com/markets/europe/rosneft-says-h1-net-income-up-13-yy-72-bln-2022-09-15/ (David Evans & Alexander Smith eds.); Yahoo! Finance, *Home Page*, https://finance.yahoo.com/ (last visited Dec. 19, 2022); China Petroleum and Chemical Corporation, Third Quarterly Report for 2022, at 3, 16 (2022), http://www.sinopec.com/listco/en/Resource/Pdf/2022102806.pdf; Investing.com, *CNOOC Ltd. (0883)*, https://www.investing.com/equities/cnooc-financial-summary (last visited Dec. 19, 2022).

so), governments must drive such action with "sticks" in the form of taxes, regulations, and the other steps that governments can take to protect people around the world. Doing so is more important than protecting corporate incomes, especially in the extreme amounts that are evident in the oil and gas industry today.

If the carbon tax at 21% was distributed among all approximately eight billion people in the world, each person would receive $7.63 per year. Again, not much at all. Conversely, this theory is meant as a starting point for imminent discussions. Taxation rates could be increased, and many other designs could and should be thought out in order to reach relevant goals for both loss and damage, carbon discontinuance, and appropriate, but modern, business considerations balanced against climate concerns. Extreme profiteering on energy needs should be examined carefully from various angles, including the international tax one.

National-level action can also be taken in addition to or instead of international action should the latter fail. The calculations below show the profits earned by leading U.S. companies and the tax income that could be produced on the basis thereof. (See Table 4 next page.)

Based on a potential 21% surtax on profits exceeding 10% among American oil and gas companies with an annual revenue of above $1 billion as was discussed

Table 3. Potential Global Tax Amounts at a 21% Tax Rate

Company and nation	Net income (profit)	21% tax
Gazprom, Russia	33.9	7.119
Petrobras, Brazil	34.0	7.140
ExxonMobil, United States	51.9	10.899
Shell, UK	43.4	9.114
Chevron, United States	34.2	7.182
Rosneft, Russia	14.5	3.045
ConocoPhillips, United States	18.1	3.801
Sinopec, China	10.3	2.163
Equinor, Norway	21.4	4.494
CNOOC, China	10.9	2.289
Eni S.p.A., Italy	18.1	3.801
Total	**290.7**	**61.047**

in political circles in 2022, the tax income that could be earned has been calculated below (in billions of $). (See Table 5 on page 10112.)

$21.9 billion is also insufficient to adequately compensate nations suffering from loss and damage should such a tax revenue be shifted internationally. Politically, a tax may of course not even be agreed upon at all. But if it were, it is highly unlikely that U.S. lawmakers would agree to distribute *all* such income across national borders to nations suffering from climate-induced loss and damage. Even some transfer to other jurisdictions may not be politically feasible.

As noted, President Biden's recent call for discussions in this area suggested distributing the income "to the American people." Doing so evenly would generate an income for the approximately 332 million people in the United States of only $65.96 per year. This is not much money for most Americans in times of high inflation and relatively high costs of living including, notably, fuel prices. Nonetheless, it might be a modest start to greater levels of carbon taxation at the national or even international level. Economic research shows the potential for positive impacts on climate action via CO_2 taxation either nationally or internationally.[65]

At an even national distribution, the 21% proposed tax would function progressively. This is so because $66 would mean at least a little to low-income earners, while it would be financially meaningless for higher-income earners. More importantly, an excess tax on oil and gas companies could and arguably should be designed to be more progressive than an equal distribution. This is more equitable and more popularly acceptable, which means a greater potential for political buy-in as well.[66] The interface between climate change and financial justice is great. So is the interest in national self-preservation. These issues will be only briefly examined next, as it is beyond the scope of this Comment to go into issues that, further, ought to be acceptable to most Parties by now if they are willing to act ethically toward others while taking national interests into account.

Table 4. Leading U.S. Oil and Gas Companies (in Billions of $)

Company	Revenue	Net income (profit)	Profit margin
ExxonMobil	403.0	51.860	13%
Chevron	238.0	34.167	14%
Marathon Petroleum	173.0	11.969	7%
Valero Energy	170.5	9.424	6%
Phillips 66	162.3	10.413	6%
Energy Transfer	88.0	4.101	5%
ConocoPhillips	78.9	18.058	23%
Plains All American Pipeline	57.4	1.023	2%
Enterprise Products	55.9	5.056	9%
World Fuels Services	55.1	0.100	0.2%
Total	**1,482.1**	**146.200**	**N/A**

Note: The figures in the table are for the 12 months ending September 2022.

Sources: Nane Sönnichsen, *Leading Oil and Gas Companies Based on Revenue in the United States as of 2022,* Statista (June 14, 2022), https://www.statista.com/statistics/257417/top-10-oil-and-gas-companies-worldwide-based-on-revenue/; Macrotrends, *Homepage,* https://www.macrotrends.net/ (last visited Dec. 19, 2022); World Fuel Services, *SEC Filings,* https://ir.wfscorp.com/sec-filings (last visited Dec. 19, 2022).

V. International Distributive Justice for Equitable and Insurance Reasons

From equitable, ethical, and normative angles, companies and nation states should no longer be able to escape the financial consequences of their choices regarding climate change inaction and ignorance (if not outright deceit in some cases). In at least English-speaking common-law nations, tort law has long formed a legal basis upon which liability may be placed on actors who bestow harm on others to pay for such harm. Internationally, the polluter-pays principle warrants the same (albeit not a legally enforceable doctrine in the opinion of some). In short, the time

65. Myanna Dellinger, *Carbon Taxation for Climate Change Mitigation*, 11 La. State U. J. Energy L. & Res. 147 (forthcoming 2023).

66. *Id.*

Table 5. Potential U.S. Tax Revenue at a 21% Tax Rate

Company	Net income (profit)	21% tax
ExxonMobil	51.90	10.9
Chevron	34.10	7.2
ConocoPhillips	18.10	3.8
Total	**104.20**	**21.9**

for financial payments for international climate change loss and damage has arrived.

Beyond mere payments for harm, a taxation with revenue-shifting to the nations suffering loss and damage already and likely to suffer more without the ability to pay for necessary adaptation should be considered. This may be seen as a type of "wealth redistribution." While that may sound socialist to some, the theory has, for good reason, garnered attention among scholars and policymakers internationally given the extreme income and wealth disparities at the national and international levels.[67]

Before writing the notion off as unrealistic given today's stark capitalist and political realities, it would be wise to think about the benefits that may derive from international distributive justice at the supranational level in relation to climate change. After all, the earth is a closed system with finite resources, but there is a rapidly growing population and demands for corporate "growth" at almost all costs. One nation's gains are typically another nation's losses; a zero-sum game. To avoid a path toward solutions that are both ecologically and economically unsustainable,

> incorporating distributive-fairness considerations into long-term international agreements should be viewed not only as a redistributive wealth transfer, but also as an act of insurance against economic volatility. Therefore, the common understanding, which associates distributional fairness only with state benevolence, is wrong and misleading. Rational state actors will seek to incorporate some distributive-fairness considerations if they view doing so as a way to hedge against uncertainty in their future economic positions.[68]

Of course, "insurance includes much more than an attempt to avoid destitution and should be thought of as a way to deal with any type of uncertainty."[69] Corporate taxation can be designed to be a method of protecting environmental goods; an "insurance" against the extreme uncertainty we are currently facing from the threat of climate change. Globalization came about relatively swiftly and reached a very large scale without the international governance system being able (or willing) to develop international environmental and tax law sufficiently quickly to protect the public good of a healthy, indeed livable, global climate system.

Instead, globalization was reached via a rather extreme, we now know, focus on profits and trade liberalization. Further,

> [t]he process of globalization was heavily influenced by neoliberal ideologies that support an agenda of rapid trade liberalization. Under these approaches, states are supposed to act as the pure homo economicus—rational, self-maximizing, and completely egoistical. This framework leaves very little room for fairness considerations and is suspicious of, if not hostile to, arguments about international fairness considerations. . . . Reality, however, has changed significantly over the last decades in two important respects. First, the role of international regimes and agreements has transformed from merely attaining coexistence to achieving more active coordination that would allow a stable supply of certain global public goods. International market integration has reduced the ability of states to effectively govern many issues unilaterally and to successfully provide public goods. This is problematic because the integrated global market stands upon the infrastructures of nation states. Therefore, the sustainability and stability of this new global setting depend on nation-states' capability to correct market failures and to provide public goods. This has resulted in a growing understanding that states need to coordinate their actions in order to increase the well-being of their citizens.[70]

With that insight, the current model of an interdependent world economy in which sovereign nation states are not able to coordinate their actions in order to deliver many important public goods such as a livable climate is unsustainable in a literal and economic sense.[71] The rapid growth of globalization resulted in great wealth for some, but also increased the number of problems that nation states cannot control or solve independently.[72] These include environmental threats, international and intranational inequalities, and a contraction of many social safety nets due to fiscal constraints.[73] The situation must be seen as both one of international fairness and a healthy level of self-preservation.

Unfortunately, that is not often what happens:

> This failure is interesting as a theoretical matter but disturbing from a policy perspective. . . . [R]ecognizing the insurance function and incorporating fairness-considerations is a crucial component in the success of future agreements. Furthermore, the incoherent way in which distributive considerations are implemented today—via

67. Such wealth disparities are evident among both nation states themselves and individuals, but this Comment focuses only on national-level action.
68. Ilan Benshalom, *Rethinking International Redistributive Justice: Fairness as Insurance*, 31 B.U. Int'l L.J. 267, 268-69 (2013).
69. *Id*. at 269.
70. *Id*. at 270-71.
71. *Id*. at 271.
72. *Id*.
73. *Id*.

> vague differential treatment arrangements that rely on insensitive categories to bunch countries as either developed or developing—provides little (if any) insurance value. This lack of insurance function has had devastating effects with respect to the underprovision of certain international public goods—such as environmental protection with respect to climate change. Rather than promoting long-term coordination, distributive considerations have inhibited cooperation and made it hard for countries to take on substantial long-term obligations. While there are many impediments to solving climate change issues, the unwise (non)utilization of fairness-considerations' insurance function explains some of the main difficulties of reaching a viable and effective agreement.[74]

In short, increasing awareness and incorporation of fairness considerations in both national and international contexts is not only holistically sound, it is also good practice seen from a national-level "insurance" point of view. In particular, this is a key and acute consideration to be given much more thought imminently in relation to supranational-level climate change action that could, in addition to loss and damage provisions, also include excess profit taxes on oil and gas producers.

It is beyond the scope of this Comment to go further in depth into issues of fairness and equity. Additionally, well-meaning individuals, corporations, and governance entities must, at this point in time, be said to either be fully aware of the issues at stake in this context or have other sources from which to obtain such awareness. The next section sets forth a few final points.

VI. Conclusion

This Comment is meant to form a foundation for further discussions among relevant private and government actors of the need to provide funds for loss and damage to nations already suffering severe consequences of climate change. National-level, voluntary contributions were, for the first time ever, agreed upon at COP27 in Egypt in November 2022. That was a surprisingly positive development.

Importantly, however, nations are *not* accepting legal liability for all their past action or inaction. Further, many details have yet to be addressed and agreed upon in the UNFCCC-based loss and damage program. Indeed, it remains to be seen whether a sufficient number of nations will actually transfer sufficient amounts of money to those nations who need it, or whether this development is yet more empty or quasi-empty rhetoric. "Greenwashing" remains a risk at both corporate and national levels.

In the meantime, 142 nations have at least officially agreed on a tax-shifting scheme in the form of the OECD/G20 BEPS Project. This allows for nations to levy a tax on products and services used in their jurisdictions instead of such taxes inuring to the benefit only of those nation states in which the selling corporations are headquartered. A similar scheme could be devised to shift revenue from highly profitable oil and gas companies to nations in need of assistance with climate change-related loss and damage. Such a private-to-national revenue-channeling treaty would be new, but could help with both actual income and important signaling effects.

Many hurdles may, of course, arise if nations were to attempt to adopt such an agreement. Similarly, feasibility issues may be too difficult to overcome in the first place. This Comment does not argue that an international excess tax treaty on oil and gas companies would be easy to negotiate or implement. Rather, it has identified such an agreement as one more step to investigate in times when we, trite as it may sound, truly need urgent action from all angles. Innovative solutions may fail, but they may also succeed. We cannot afford *not* thinking about and experimenting with new solutions to the super-wicked problem of climate change. This is especially so while fossil fuel companies earn extreme, arguably excessive, amounts of money while literally destroying the planet that belongs to all of us.

Benefits of and arguments for an international tax on excessive profits in the oil and gas industry exist. For example, setting aside corporate traditions, it must be said to be fair that those corporations who derived extreme amounts of money on products they knew for decades to be dangerous should pay for the damages they caused. That arguably falls under both tort law and the polluter-pays principle. The United States has indicated an interest in implementing steps against nations such as Russia, which arguably profits greatly from yet another needless and vile war. But beyond considerations of war profiteering, climate change presents a case in and of itself for implementing new types of taxes and other financial programs to help those nations that are now suffering the consequences of the energy patterns of the developed world for a century or more.

This would be a step in the right direction with, of course, many more needed. The road ahead toward achieving sustainability in our energy needs is not easy. Pitfalls and complexities have to be solved. It has, however, become abundantly clear that we face justified and just demands for compensation to be paid to those nations that suffer loss and damage from the current and past energy usages and even excesses in, typically, the developed world.

In short, in addition to broader and deeper carbon taxation at the national level, the international legal system should consider negotiating in place a multilateral tax treaty levying taxes on profit-rich oil and gas corporations. This could alleviate some pressure on some nations to pay loss and damage funds, or add appropriately to it.

74. *Id.* at 313.