RISA GOLUBOFF: Welcome to everyone, and thank you all for coming. Our format will be a little different today than it usually is. So Ruth will lecture first, and then we have box lunches. And I encourage you to take them and sit outside and commune with people afterwards. But do whatever is comfortable for you.

So the beginning of the school year is always a hectic time, and there's a lot going on. And this year I think is especially hectic, given that we are all navigating our return to in-person classes. And it is just wonderful to have such a happy event to all come together for, and something so central to what we do here, which is to celebrate our colleague and her scholarship, and have her share some of it with us. So I'm really, really pleased to see you all and to see so many students, which is real testament to Ruth and her relationship with them.

So this is the Chair Lecture for the Edwin S. Cohen Distinguished Professorship in Law and Taxation. It was funded by Edwin S. Cohen of the class of 1936, and his son, Edwin C. Cohen, of the class of 1967, as well as other donors.

The elder Mr. Cohen joined the law faculty in 1965. He subsequently served as assistant treasury secretary for tax policy and as undersecretary of the Treasury. He was a special consultant on corporate taxes to the House Ways and Means Committee. And in 1977, he became a partner in the law firm of Covington and Burling. The younger Mr. Cohen served for many years as a president of Carlin Ventures, Inc., an investment company.

We have had one previous recipient of this professorship, George Yin, from 2006 to 2019. And I'm delighted that George is here with us today. And I'm also delighted that Ruth Mason is following in his footsteps. He has left large shoes, and she is ready to fill them.

Ruth graduated from Columbia University in 1997, receiving her BA with honors in History-- US History. She received her JD cum laude from Harvard Law School in 2001. After law school, Ruth worked as a Tax Associate at Willkie, Farr, and Gallagher in New York, and entered academia in 2002, serving as the Executive Director of NYU's Graduate Tax Program and the deputy director of NYU's International Tax Program.

Ruth then moved to the University of Connecticut Law School, serving as Associate Professor, Professor, and ultimately, Anthony J. Smits Professor of Global Commerce between 2006 and 2013. She then joined our law school, the University of Virginia Law School, as a tenured professor in 2013, and has been here ever since.

She is a leading voice, a leading voice internationally-- I want to emphasize that-- on issues relating to cross-border taxation and corporate tax reform. She has an abiding interest in tax discrimination and the Dormant Commerce Clause. And she has written articles on a variety of tax issues that have appeared in the *Virginia Law Review,* the *Virginia Tax Review,* the *Yale Law Journal,* and the *Tax Law Review,* among other publications. I'll talk about some of the other publications in a minute.

Ruth's scholarly interests and her reputation extend far beyond our national borders. She has academic appointments as Professor-in-Residence at the International Bureau of Fiscal Documentation in the Netherlands. She has served as a Fulbright Senior Scholar at Vienna University of Economics and Business Administration, and she's been a visiting Professor at Universite Paris.

Her scholarship, in addition to her law review articles, includes a book, *The Primer on Direct Taxation in the European Union,* a section on tax discrimination in the *Research Handbook on International Taxation.* She is the co-editor of Kluwer's series on *International Taxation,* and a member of the editorial board of the *World Tax Journal.*

She has also served as national reporter for the United States to the International Fiscal Association, and as principal author of several amicus briefs, including one cited by the United States Supreme Court in *Comptroller of Treasury of Maryland versus Wynne.* That is quite a body of work, both scholarly and practical. It is one we should all aspire to.

Closer to home, and as I imagine everyone in this room already knows, Ruth is a remarkably engaged, energetic, and supportive member of our entire UVA law community. One example of her enthusiastic contributions, not only to her own scholarship, but to the scholarly development of all of us, is how she threw herself into her leadership of the Faculty Enrichment and Visibility Committee over the past several years, joining Twitter, writing blog posts and op-eds, appearing on podcasts, including mine and Leslie's. In short, she made herself a guinea pig for every half-reasonable idea she came across for how to disseminate faculty scholarship, much to the benefit it of everyone in this room.

Ruth is equally generous with her students, and their presence here today, I think, testify to that. They rave about her teaching and her mentorship. She has been the faculty advisor and moving force behind the law school's International Tax Moot Court Team, which has won three international championships, including the first one ever by an American team.

I once heard Ruth advise a group of 1Ls to take Federal Income Tax early because, quote, "There is nothing sadder--" nothing sadder-- "There is nothing sadder than a spring semester 3L who realizes in their very first tax class that they want to be a tax lawyer." Nothing sadder.

Ruth has, I think, single-handedly made tax lawyers out of many of our students. To her students and her colleagues, both here and around the world, she brings wit, humanity, a wide and deep curiosity about the law and connections to practice, in addition to her brilliant scholarship and extensive experience. I am so looking forward to her talk today on the transformation of international tax in the wake of the recession in 2008. Please welcome our new Edwin S. Cohen Distinguished Professor of Law and Taxation.

[APPLAUSE]

RUTH MASON: Help. I'm stuck on the wrong side of the podium. Well, thank you, Risa, for that far too generous and really moving introduction. Risa said some words about Edwin S. Cohen, and I just want to add a little bit for myself.

So some things not mentioned by Risa-- Cohen led an effort to conform the Virginia income tax with the federal income tax, thereby simplifying the tax compliance of millions of Virginians. In addition to his devoted public service, he was also an inspirational teacher and a consummate institution builder. He helped found the Tax Forum, where New York City tax lawyers to this very day gather and discuss tax papers. And he also helped found the *Virginia Tax Review* and the Virginia Tax Study Group.

So I never had the privilege to meet Eddie Cohen, but it is a special honor for me to hold the chair name for such a renowned tax professor and public servant, especially one so recently held by my dear colleague, George Yin. So thank you to Eddie Cohen, his family, our alumni, and the dean for the opportunity to talk to you. And thank you to faculty, students, staff, my family and friends, for joining me on this occasion.

[LAUGHTER]

You can see why I blanked it before you came in.

[LAUGHTER]

When Teri Johnson told me that the dean would buy everyone lunch and I would get to talk to you for an hour, I thought, what an awesome power. I would have the whole UVA faculty captive for an hour. How could I spend the time? What would I talk about?

Now, tradition dictated that I should give a paper that I had written, so that narrowed it down. But what topic? I could talk to you about tax discrimination, and you'd listen politely and be bored. I could talk to you about the EU state aid principle, its anti-subsidy principle, which I've been banging my head against for a couple of years.

Finally, I have a breakthrough. I have something to say. I could tell you about that. And I would have to tell you about the international tax rules and transfer pricing. I would need slides. The problem is that then you would feel as if you were banging your heads against a brick wall.

I realized I couldn't do it to you. You're my friends. And I hope that after an hour you'll still be my friends. So I'm not going to talk to you about the Apple tax plan.

[LAUGHTER]

[APPLAUSE]

Instead, I'm going to talk to you about a paper that grew out of the *Common Law* broadcast. The first season of the *Common Law* broadcast, Leslie and Risa approached me and said that they wanted to talk about something that was of general interest in international tax.

Now, despite all the lies Leslie just told-- or Risa just told-- I did not joyfully agree to do this podcast. The first thing I did was try to get out of it. I assured them both that there was nothing of general interest in international tax, nor would there ever be. But Leslie and Risa persisted. They gave me a time and a place and a location that I should show up and talk about international tax.

Since our topic was the future of law, I thought that I should talk about the then-new 2017 tax legislation. But I couldn't talk about the technical details because that's not of general interest. So we talked instead about why the United States would want to dramatically reduce its corporate tax rate and apply a minimum tax to its multinationals on their income abroad. So we had a nice chat about the corporate tax planning. And Risa and Leslie were happy-- or, at least, I didn't hear any complaints. And I went back to state aid and to tax discrimination.

Then a strange thing happened. I went to my nephew's wedding. And at the rehearsal brunch he said, Aunt Ruth, I listened to your podcast.

[LAUGHTER]

I said, Danny, I already made out the check. There's no reason for you to say this. And his sister said, no, it's true. He sent me the link. And I-- you know, trust but verify. I looked at YouTube, and 400 people had listened to this *Common Law* broadcast.

Now Mary Wood assured me in a very kind way that that's not really so very many people as these things go, but they couldn't all be relatives. So I suddenly had what I always wanted-- relevance in tax. So I decided that if nephews and 400 perfect strangers could be interested in international tax, so could others. And I didn't want anyone's tax curiosity to go unanswered.

I also hope to build bridges to international lawyers whose insights we tax people will sorely need as international tax becomes more international. Tax has a deserved reputation for being complex. But I hope today to convince you that you don't need a lot of technical background to understand what's at stake when the disputes are about how countries can effectively tax multinationals, and how they can split the revenue between them.

So overall, the paper that I'm presenting does a few things. So one, is it provides this general introduction to what's happening in international tax. Another is to push back on what I saw as an overly negative reaction in the scholarly community to the BEPS, the Base Erosion and Profit Shifting project.

The scholarly reaction to this project was that it was no big deal. And that's a tempting position to take if you look only at the reforms that were recommended from it. But in my view, that misses the forest for the trees.

So what you have at the end of BEPS is a much more cooperative, much more international way of forming tax policy. There's a tendency to undervalue incrementalism, but I wanted to highlight what, in my view, BEPS had really changed.

Last, I wanted this paper to serve as a record of what one informed tax person who is carefully following the developments thought. Because the other thing that's happening here, which makes it harder for us to appreciate how much the landscape has changed, is that we analyze everything in retrospect. And things have a way of looking inevitable when we look at them from even a short distance of time.

So I hope you will all be relieved that I will not be reviewing that slide. That is not even my slide. I just googled "Apple tax plan," and picked the most complicated picture I found. That one was from *Wired* magazine. To my students, we will be reviewing the Apple tax plan, but I will not use that diagram to do it.

OK. Nevertheless, to give you a sense of what's going on in international tax, I do have to give you some broad background. So the international tax system reflects two broad principles-- source and residence. A corporation's residence for tax purposes is clearly, although arbitrarily, defined as its place of incorporation or its place of management and control. And the resident state gets to tax a corporation on all of its income wherever earned.

The source of a corporation's income is, informally speaking, where it derives its income. So the source state gets to tax that income. Now, the source of income is something that's highly disputed. Source and residence jurisdiction overlap. One country can be the source, while another country is the resident state of a corporation. In this case, both states get to tax. The source state goes first, and the resident state is expected to relieve any resulting double tax.

Tax treaties changed the situation by obliging the source state to share in the obligation to avoid double tax, specifically by taxing less. Because poorer states tend to be net source states, and richer states tend to be net resident states, treaties tend to shift revenue from poorer states to richer states, compared to a no treaty situation.

Tax treaties introduce important limits on source states' entitlement to tax. For example, under tax treaties, a state cannot tax a foreign corporation unless that corporation has what's called a permanent establishment in the source state. That's the Nexus rule. A permanent establishment is a physical place, a physical presence, or a dependent agent. So that's the background to our story.

Now, our story begins before the 2008 crisis. The best way to describe states' attitudes towards corporate tax avoidance before the crisis is one of indulgence, or at least, complacency. And there are a number of reasons for that.

So first, countries knew that this permanent establishment requirement was growing more and more obsolete, but tax treaties are hard to renegotiate. And what's more, the obsolescence of the permanent establishment requirement meant that other countries couldn't tax the income of US companies when they had income putatively sourced in other jurisdictions. So this meant that the US didn't have an obligation to relieve that double tax, because the first tax didn't happen. So it wasn't in the interest of the United States to update the permanent establishment requirement.

The second issue was what might be called national fragmentation. So different states had different laws, and importantly, they had different tax rates, and lawyers were able to exploit those differences to avoid tax. So for example, companies could move mobile and highly valuable intangibles to low-tax states.

So, for example, a company could move a valuable intangible to a low-tax state, and then charge related parts of the company high royalty rates-- deductible payments out of higher tax states-- to be paid into the low-tax jurisdiction. From a group perspective, the company's income didn't change, but it would save tax due to the differential between the two states' incomes. In a world where countries have different tax rates, a taxpayer that can choose where in the world to declare its income can choose its tax rate.

In another example, Ireland defined residence for tax purposes-- corporate residence-- to be where a company was managed and controlled. The United States interpreted it to be where the company was incorporated. So by incorporating companies in Ireland and managing and controlling them in the United States, lawyers were able to create stateless companies taxable on their worldwide income by no country on earth. As Ed Kleinbard poetically put it, "Stateless persons wander a hostile globe looking for asylum; by contrast, stateless income takes a bearing for any of a number of low- or zero-jurisdictions, where it finds a ready welcome."

Although some states enacted unilateral measures to reduce corporate tax avoidance, those measures were not particularly effective. Enforcement was spotty, in part due to interest group capture, and in part due to real concerns that states would lose real investment to other less strict states. Tax competition drove headline corporate tax rates down, and politicians came to believe that tax avoidance strategies available to their corporations that were unavailable to other countries' corporations was an important source of competitive advantage.

There was also the problem of tax havens, which did not want to cooperate because they had nothing to gain from cooperation. They certainly couldn't be introduced to cooperate by the promise of higher tax revenue. They knew that if they raised their taxes instead of more revenue, they would get less investment.

There was also a general uneasiness about ceding any part of a state's tax sovereignty to a supranational entity as part of an agreement to combat tax avoidance. Moreover, because each national tax system was sealed off from the others, domestic tax authorities only saw the part of the company's income that the company chose to show them. The scope of the problem was, thus, unknown and remains to this day a matter of dispute among empiricists.

Don't get me wrong. As the OECD put it, there was abundant circumstantial evidence of profit shifting, including that in 2010, Barbados, Bermuda, and the British Virgin Islands received more foreign direct investment than did Germany. Yeah-- abundant circumstantial evidence. The British Virgin Islands was the world's largest investor in China, well ahead of the United States. Statistics like this suggested significant profit shifting, but the full scope was unknown.

Finally, and I don't think this can be underestimated, tax avoidance techniques used by multinationals were perfectly legal. Take the US/Irish residence mismatch. Apple took advantage of this. By doing so, Apple broke neither the laws of the United States, nor the laws of Ireland. One way to close this loophole would be for Ireland and the United States to have the same tax residence rule. But the one thing all the states agreed on was that they didn't want to harmonize their taxes.

So due to all of these barriers to competition we had before the 2008 crisis, international tax just wasn't all that international. Each state had domestic rules for how to treat inbound transactions, and each state had rules for how to treat outbound transactions. There was a large network of 3,000 bilateral tax treaties that connected the domestic systems, and these treaties were based on a model that was negotiated at the OECD. But the OECD itself only recently reached 38 members.

Other than the model treaty, we had the OECD commentaries to interpret the treaty, and the transfer pricing guidelines, also written at the OECD, these define how to determine the income of separate legal entities and branches of multinationals. But overall, international tax just didn't get all that much attention.

Moreover, the main goal of the rules derived cooperatively was to reduce transaction costs for multinationals to pave the way for investment, and in particular, to eliminate double tax. So while countries were really good about eliminating double tax, they ignored the gaps. All this changed with the 2008 financial crisis, which triggered job losses, budget and monetary crises, and a new intolerance of corporate tax dodging.

Corporate tax dodging was nothing new. What was new was the degree of popular awareness and opposition to it, especially in Europe. The Senate Permanent Subcommittee on Investigations and the UK House of Commons Public Accounts Committee conducted some hearings.

They called corporate executives from some of the world's largest, most profitable companies-- Amazon, Google, Starbucks, Apple, HP. The topic was corporate tax avoidance. These were informational hearings. How are you doing it? Tell us how you're doing it.

The testimony was explosive. A Starbucks executive testified to the UK Public Accounts Committee that it had a low-tax ruling with the Netherlands, and that the Netherlands had asked Starbucks not to share it. The same executive from Starbucks testified that Starbucks had been unprofitable in the UK for 14 out of 15 of the prior years, despite opening numerous new stores and having sales of over $5 billion year over year. British people boycotted Starbucks. They picketed Starbucks in the streets.

Back home, in the Senate, an Apple executive testified that Apple negotiated a special tax rate with Ireland. Apple later amended that testimony, but not before it was published in every major newspaper on earth. It was at these hearings that we learned of the statelessness of the Apple subsidiaries. Major newspapers published diagrams of Apple's tax plan. There was a picture of Apple's tax plan on 1A of *The New York Times.* That picture came from *Wired* magazine. Everybody was interested in Apple's tax plan.

Double Irish with a Dutch sandwich entered the vernacular. Not long thereafter, in an episode that came to be known as LuxLeaks, a whistleblower inside a PWC disclosed a large cache of rulings that the government of Luxembourg issued to PWC clients.

Many of these rulings were nothing out of the ordinary, but some seemed to appear to grant secret sweetheart deals to the PWC clients. This news, too, was splashed all over the newspapers, and it inflamed popular sentiment against corporate tax dodging, especially in Europe, where the perception was that it was US companies coming in, making money, and paying no tax.

Treasury official Manal Corwin described this as the mainstreaming of international tax. Suddenly, voters were paying attention to corporate tax, and that meant politicians had to pay attention, too. The G20 resolved it had to do something about corporate tax avoidance. Lacking a permanent staff, the G20 assigned the task to the OECD, and the BEPS, Base Erosion and Profit Shifting, project was born.

Thus, it was the financial crisis and popular dissatisfaction with corporate tax dodging that overcame long-standing barriers to multilateral tax cooperation. Working tirelessly over the next 2 and 1/2 years, I think nobody at the OECD slept. By the end of 2015, the OECD delivered recommendations in 15 areas.

The academic reception to BEPS was generally lackluster. So leading commentary, Reuven Avi-Yonah, called it a patch-up. Our own Graeme Cooper called it a project which skirted danger, was vague, and anemic. Mindy Herzfeld called it so watered down as to be meaningless. Allison Christians characterized it chiefly as a move by the OECD to secure control of international tax policy over rival policy-making institutions. The general reaction was one that BEPS imposed or suggested only minimal, or at best, modest reforms.

But here, as in so many areas of tax, I think we encounter a baseline problem. Many academics were disappointed because BEPS did not implement their favored reforms. But should BEPS be judged by a baseline of academics' most optimistic goals for international tax reform? Or is it more appropriate to measure BEPS against what came before?

I agree with my tax colleagues that most of the specific recommendations emerging from the BEPS project, the so-called BEPS deliverables, do not represent dramatic reforms. In my view, however, evaluating BEPS only according to its deliverables understates its impact. Now, I don't want to take you through the specific BEPS recommendations, but at a high level, I want to suggest that BEPS had a profound effect on the decision-makers, agendas, institutions, norms, and even the legal forms of international tax.

So first the decision-makers. For nearly 100 years, international tax policy was the near exclusive domain of the OECD countries, a small group of mostly rich countries. The BEPS project brought into the process, on an equal footing with the OECD countries, the eight G20 countries that were not OECD members. That's Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia, and South Africa. These eight countries collectively have a population of 3.5 billion people. They widen the perspective of the OECD. And in particular, they brought a much needed developing country perspective to BEPS.

In addition to bringing in the G20, the OECD formed a larger group called the inclusive framework, which consists of all the countries committed to implementing the BEPS minimum standards. This organization presently stands at 140 members.

Next, institutions and agendas. Here, I largely agree with Allison Christians, that one of the effects of the BEPS project was to entrench the OECD as the principal place for international tax policy-making. The success not only of BEPS, but of prior OECD projects, especially on tax information exchange related to individuals, solidified the position of the OECD as the premier forum for international tax.

But more than merely entrenching the OECD, BEPS vastly expanded its charter. The OECD now makes policy not just for its 38 members, but effectively, it stands at the center of policy-making for the 140 countries in the inclusive framework. No longer is international tax policy limited to a model bilateral treaty commentary on that model and the transfer pricing guidelines.

As an example, in BEPS, the countries made recommendations for changes to domestic law. That was a first. What's more, countries implemented those recommendations for changes to domestic law, including the United States. While the OECD does not represent a supranational legislative body or any of the other nightmare scenarios that it's sometimes accused of, it is undeniable that BEPS greatly expanded the influence of the organization, and made the OECD the obvious forum to resolve the current global allocation dispute, which I will discuss later.

Third, norms. For a long time, the most important norm in international tax was that companies should not pay tax twice to two different countries on the same income. States overcomplied with this no double tax norm, which resulted in widespread non-taxation. Today, however, states increasingly support a norm of what might be called full taxation, under which all of a company's income should be taxed where it has real business activities.

The full tax norm didn't begin with BEPS, but to a significant extent, BEPS reflected and effectuated this norm. Nearly all the BEPS recommendations aim to promote full tax, and three out of four of its minimum standards, which all of the 140 states agreed they would implement, do so.

For instance, one minimum standard requires country-by-country reporting. This provides governments a global and per-country overview of profits, sales, employees, income, and places where companies declare and pay taxes. This way, countries can have a sense of where income is over and underreported relative to real activities.

Thus, instead of only seeing their part of the corporate structure, each state gets a good sense of what the corporation is doing and what it's earning all over the world. The clear motivation for such a view is to promote full tax.

Another transparency measure requires exchange of administrative rulings. Before BEPS, a taxpayer could secure a ruling from state A, in which state A agreed not to tax income, because that income would be more appropriately taxed by state B. But nothing required the company to actually declare that income to state B. And before BEPS, state B wouldn't even know of the existence of the ruling that state A gave.

After BEPS, the states exchange the rulings with each other. This reduces the taxpayer's ability to take inconsistent positions in different states with respect to the same income. Opposition to such inconsistent positions reflects a full tax norm.

Even more obviously in support of full taxation, states agree to change the preamble of their tax treaties to reflect that their purpose was not merely to avoid double tax, but also to prevent tax evasion and avoidance. Likewise, they agreed to stronger anti-abuse rules in their treaties.

Fourth-- effectuating BEPS recommendations necessitated new legal forms. Many of the BEPS recommendations require changes to be made to bilateral treaties. To implement these changes expeditiously without requiring renegotiation of 3,000 bilateral tax treaties in force, the BEPS countries invented a new instrument of international law-- the Multilateral Instrument, or MLI. This was a multilateral treaty to update bilateral treaties. The MLI embodies the pragmatic innovation typified by BEPS. It's also a significant step toward and a proving ground for a real multinational tax treaty in the future.

The BEPS countries also implemented a collection of coordinated unilateral measures. They set standards cooperatively with the expectation that the law would be implemented domestically, either by the legislature or by the executive. Many of these measures, these coordinated unilateral measures, took the form of what I like to call fiscal fail-safes-- rules under which if one state doesn't tax, another state automatically fills the void. I won't go into the details. You can thank me later. But many of them are pretty neat.

Fiscal fail-safes implement the full tax norm by clawing back the benefit of tax planning and of state-provided tax incentives, thereby discouraging both aggressive tax planning and state-level tax competition. This is me skipping the details.

[LAUGHTER]

Good decisions happen late at night. Finally, I argue that BEPS was not the endpoint, but rather just the starting point in these multinational-- or multilateral negotiations. So as the states devised effective strategies for combating corporate tax avoidance, they were growing the revenue pie. But they heated up long-simmering discussions about how to split that pie.

Academics rightly complained that the BEPS countries refused to deal squarely with the important distributional concerns that the BEPS project raised. Instead, they preferred to make limited progress on closing loopholes. For example, the very first area of concern identified by the OECD when the G20 handed them this project was tax problems related to the digital economy. This was BEPS action item one, suggesting its importance. Here's what the OECD said about it.

They identified as a problem the ability of a company to have significant digital presence in the economy of another country without being liable to tax due to the lack of nexus under the current international rules. That's the PE problem, the Permanent Establishment problem. But when it came to bargaining over action one, the United States was not in the mood.

As a resident state of a very disproportionate share of the world's largest tech companies, the United States argued that the digital economy was the economy and couldn't be segregated from it. Therefore, it shouldn't be subject to special purpose rules. So the countries swept action one under the table, under the rug. It got no recommendation. They simply avoided the distributive issue.

Notice that the full tax norm is also deficient on the distributive question as well. To say that all of a company's income should be taxed says nothing about which country should tax that income. But without a clear consensus on the rules to allocate tax entitlements, a generalized norm of full tax can lead to double tax.

A great example of this is the European Commission's state aid investigation against Ireland for alleged subsidies that Ireland granted to Apple. The nature of the commission's claim was that by not taxing Apple enough, Ireland subsidized the company.

Apple had stateless companies. It had companies that were incorporated in Ireland, but managed and controlled in the United States. And consistent with good tax planning practices, it shifted to these stateless companies as much of its global profit as it possibly could.

The European Commission's response was to say that because the companies had a connection to Ireland-- they were incorporated there-- Ireland ought to have taxed all of that income, no matter where derived. But why Ireland? Why not the United States? Why not the other countries in Europe that had made those tax deductible licensing payments into the stateless companies?

If we don't have clear rules about which country gets to tax and for what reasons, we may end up with a situation in which more than one country seeks to tax the same income. This outcome would violate the other norm of international tax, the older one, that companies shouldn't be subject to tax more than once on the same income. Even the European Commission recognized this problem in the Apple case.

In a press release accompanying its decision against Ireland, the commission suggested to other EU member states, and astonishingly also to the United States, that if those states would now retroactively tax Apple, that tax would reduce the recovery due in Ireland. So this idea of full tax, when divorced from clear ideas about which country ought to tax, can lead to a kind of free for all, in which multiple countries seek to tax the same income according to different theories of tax entitlement.

Countries have different ideas about what entitles them to tax. Of course, it won't surprise you that many of these ideas are self-serving. States think that things that they have a lot of, whether that's management, R&D, labor, natural resources, factory sales, or lately, digital users, ought to generate tax entitlements. But we lack strong shared ideas about what factors generate entitlements to tax.

Nor are efficiency goals a useful guide here. There are so many margins you can optimize for an international tax that you end up with not just different, but incompatible recommendations when you look at efficiency. Nor do we have anything like consensus on distributive justice.

The way countries have dealt with distributive justice is to pretend that these questions can be pushed down to the national level where they can be dealt with through Democratic processes. But there's no escaping the distributive question at the heart of international tax-- who gets to tax what?

Suppose you have a multinational enterprise with very large profits and it's active in several states. Its shareholders are in state A. It's incorporated in state B. Its managers are in state C. Its R&D is in state E. Its IP is in state F. It's got customers all over the world. Which states get to tax? If all of them, in what proportions? Even though there's no strong consensus as how to answer this question, T.S. Adams called it a truism of international tax that every jurisdiction with a colorable claim and the power to assess will in time succeed in collecting some tax.

Lately, France and the UK and other countries have proved this with their digital taxes. These are countries that have started feeling for the first time the pain of the obsolescence of the permanent establishment requirement. Twitter, Facebook, Airbnb, Amazon, Google-- all of these countries can be involved in the economies of various states without having a physical presence in them. They can earn profits in France and the UK without being there physically.

To quote the head of tax for the OECD, "The Europeans have experienced what it's like to be a developing country. They had clever people coming in, making money, not giving anything back, and then leaving. These countries have become increasingly frustrated with their inability to tax the tech giants, especially because they rightly perceive that their own residents as users are contributing significantly to the profits of those companies."

So now you have the interests of developing countries who've long given up tax entitlements in tax treaties being aligned with those of the most powerful European countries. Both sets of countries have set their sights on the same object-- the US tech giants. To tax the tech giants, they needed to get around their treaty obligations which prevent them from assessing income tax in the absence of a permanent establishment, a physical presence.

So they invented special purpose digital taxes. These are not income taxes, so they're not barred by the treaty. The countries designed the digital taxes to narrowly target the biggest digital companies-- US companies. There are many such taxes around the world now.

So although it's true that the countries didn't squarely confront the allocation question as part of BEPS, it was not true that they could avoid it forever. We're now talking about what has colloquially come to be known as BEPS 2.0. This negotiation is currently taking place at the OECD in the inclusive framework among 140 countries.

The negotiation involves two main reform efforts. One is reform of the permanent establishment requirement, to have a nexus that doesn't require physical presence. We'll have to see what happens, but it's likely that this nexus will depend on sales into the state. It will at first only apply to the world's biggest companies.

The idea here is that if a new nexus can be agreed at the OECD, states would, in exchange for that, give up their digital taxes. So those digital taxes were necessary to provide leverage for these countries against the United States, who would have preferred to say, well, let's keep the obsolete permanent establishment requirement as it is.

The other big negotiation happening right now is over minimum tax. The high states want to defeat the tax havens. They want to cabin tax competition by subjecting the income of large multinationals to a minimum tax, as with the current negotiations, at least 15%. This is a very complex proposal that would at first, at least, only apply to the world's biggest companies.

The proposal is optional. States don't have to adopt it. But there's still a lot of disputation about its features, because the states that do adopt it want to make sure that they all adopt the same rules. So again, we have to wait and see what's going to happen with that.

But what we can already see is that there are not just 38 OECD countries involved in the negotiation. Rather, there are 140 members of the inclusive framework participating in the negotiation. And on July 1, the countries issued a statement outlining their agreement in principle. As of August, of the 140 inclusive framework countries, 134 had agreed to the outlined reforms.

I don't see any way we could have had BEPS 2.0 without BEPS 1.0. And it's not just a naming convention issue. What we have seen is an international tax negotiation with widespread participation that really would have been unthinkable even 10 years ago.

So I hope my update on the current events in international tax has convinced you that you are living through, although you probably didn't know, very interesting times in international tax. Thank you.

[APPLAUSE]