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Gently Down the Stream: BEPS, Value Theory and the Allocation of Profitability along Global Value Chains

OECD consultation documents and corporate sector responses relating to transfer pricing reform and the taxation of the digital economy between 2010 and 2020 are analysed through the lens of classical value theory. In the transfer pricing context, "value creation" came to mean business functions outside the classical production boundary, and in the digital economy context, a variety of heterodox positions were adopted, with recognition of the classical production boundary being conspicuous by its absence. Seemingly, profitability had to be allocated outside the bounds of the firm, given that to some extent value is created elsewhere and captured by it, but rich states and corporate capital were only willing to allocate it downstream in global value chains, where consumption is predominantly located, i.e. not upstream in global value chains to the lower-income states where, in the classical production framework, value creation is predominantly situated.

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1. Introduction

In 2013, after a period of growing public uproar over the apparent scale of corporate tax abuse, seemingly amounting to a crisis of legitimacy for the entire international corporate tax system,[1] a new international corporate tax norm emerged as if from nowhere. The global corporate tax base, at least insofar as it takes the form of profits arising to multinational enterprises (MNEs), was to be allocated between jurisdictions in accordance with where "value" is "created".[2] This new norm was not merely promulgated by the OECD; it was expressly promulgated in terms in a G20 announcement.[3] Shortly afterwards, a substantial multilateral project was constituted, the Base Erosion and Profit Shifting (BEPS) Project, with the goal of aligning international corporate tax norms with it.

It fairly rapidly became clear, however, that "value creation" in this context did not really mean anything very much at all. As Grinberg put it "[e]veryone agrees on the principle – but no one agrees what it means".[4] Agreeing on the principle is not, therefore, agreement on anything in particular, and so the idea of taxing income where value is created is, as Schön put it, a mere "mantra".[5] Indeed, it is hard to see how it could amount to anything more than a mere mantra if "value creation" is, as Herzfeld says, "an incoherent and ill-defined notion",[6] or, as Morse puts it, a "messy, political idea",[7] or, as Schön has it, a "fuzzy notion",[8] or as Christians wrote, "not even conceptually coherent as a theory".[9] The "consensus academic view" accordingly became that "any exercise to define specific sources of value creation is entirely subjective",[10] because there was simply "no common understanding of the term 'value creation'" at all.[11]

1. V. Barford & G. Holt, *Google, Amazon, Starbucks: The rise of 'tax shaming'* (BBC, 21 May 2013), available at https://web.archive.org/web/20200706062638/https://www.bbc.com/news/magazine-20560359.
2. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD July 2013), available at https://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter *OECD BEPS Action Plan*].
3. G20 Leaders' Declaration (Sept. 2013), available at https://web.archive.org/web/20190127145718/http://www.g20.utoronto.ca/2013/Saint_Petersburg_Declaration_ENG.pdf.
4. I. Grinberg, *International Taxation in an Era of Digital Disruption: Analyzing the Current Debate*, Taxes (The Tax Mag.), p. 89 (Mar. 2019).
5. W. Schön, *Ten Questions about Why and How to Tax the Digitalized Economy*, Max Planck Institute for Tax Law and Public Finance, Working Paper, p. 5 (2017).
6. M. Herzfeld, *The Case against BEPS: Lessons for Tax Coordination*, 21 Florida Tax Review 1, p. 32 (2017).
7. S.C. Morse, *Value Creation: A Standard in Search of a Process*, 72 Bull. Intl. Taxn. 4-5, p. 197 (2018), Journal Articles & Opinion Pieces IBFD; *see also* F. Muniesa, *On the political vernaculars of value creation*, 24 Science as Culture 4, pp. 445-454 (2017).
8. Schön, *supra* n. 5, at p. 22.
9. A. Christians, *Taxing According to Value Creation*, 90 Tax Notes International, pp. 1379-1383 (2018).
10. Grinberg, *supra* n. 4, at p. 95.
11. M. Olbert & C. Spengel, *International Taxation in the Digital Economy: Challenge Accepted?*, 9 World Tax J. 1, p. 12 (2017), Journal Articles & Opinion Pieces IBFD.

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It nonetheless became uncontroversial simply to infer (in the absence of any express statement from the OECD as to the meaning of the term)[12] that "value creation" was nothing other than a synonym of "economic substance" or "economic activity".[13] Indeed, a 2017 paper by Devereux and Vella goes so far as to suggest that the terms "economic activity", "relevant substance", "substantial activity" and "value creation" were being used interchangeably by the OECD.[14] "Economic substance" could be understood as having a negative or a positive meaning in this context. A negative interpretation might suggest that its purpose is only to exclude from the allocation of the tax base artificial tax-haven-based structuring,[15] or formal ownership of intangibles.[16] A positive interpretation would focus on (and inevitably critique) the implication that it is possible to individuate and locate or quantify the substantive inputs to profitability.[17]

It is because this positive concept could not be operationalized in practice that it was said not to have had any real content at all. By the time the BEPS outputs were finalized in 2015, it had come to seem that the novel guiding principle of "value creation" placed mere spin on some modifications to the system that were arguably consistent with its existing principles,[18] but which were in any event there to constrain abuses associated with artificial structuring rather than truly to embody a new principle.[19] As the IMF put it in 2019, "[t]here are circumstances of tax planning in which it may be widely agreed that no value is being created".[20] "Value creation" from this perspective means no particular thing; just anything other than the artificial elements of tax planning structures.

There subsequently evolved a contrasting flavour to the indeterminacy attributed to the concept of "value creation" in the context of the so-called "digital economy", following the reboot of the BEPS process with the objective of addressing that sector in particular in 2017. The concept of "value creation" developed into a rubric under which to seek to have the profits of web-based giants such as Facebook, Amazon and Google allocated to jurisdictions in proportions more commensurate with (say) volumes of sales or numbers of users in those jurisdictions (so-called "market jurisdictions"), notwithstanding that there may be only a modest taxable presence in the jurisdiction under the existing rules, or no taxable presence at all.

12. *See* J. Hey, *"Taxation Where Value is Created" and the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 Bull. Intl. Taxn. 4-5, (2018), Journal Articles & Opinion Pieces IBFD.
13. For an early instance of this perspective, *see* M. P. Devereux & J. Vella, *Are We Heading towards a Corporate Tax System Fit for the 21st Century?*, 35 Fiscal Studies 4 (2014).
14. M.P. Devereux & J. Vella, *Implications of digitalization for international corporate tax reform*, Oxford University Centre for Business, Taxation Working Paper, p. 8, fn. 14 (2017).
15. *See*, for example, F. Vanistendael, *An Octogenarian on Value Creation*, 90 Tax Notes International, pp. 1386-1388 (2018).
16. *See*, for example, M. Lennard, *Act of creation: the OECD/G20 test of "Value Creation" as a basis for taxing rights and its relevance to developing countries*, 25 Transnational Corporations 3, p. 58 (2018).
17. Devereux & Vella, *supra* n. 14, at p. 9.
18. *See* S.I. Langbein & M.R. Fuss, *The OECD/G20-BEPS- Project and the Value Creation Paradigm: Economic Reality Disemboguing into the Interpretation of the "Arm's Length" Standard*, 51 The International Lawyer 2, pp. 259-410 (2018).
19. *See* M. Devereux & J. Vella, *Value Creation as the Fundamental Principle of the International Corporate Tax System*, European Tax Policy Forum Policy Paper, pp. 3-4 (2018).
20. International Monetary Fund, *Corporate Taxation in the Global Economy*, IMF Policy Paper, p.18 (IMF, Mar. 2019), available at https://web.archive.org/web/20190314160442/https://www.imf.org/~/media/Files/Publications/PP/2019/PPEA2019007.ashx.

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As Devereux and Vella pointed out, this opened up the question of what "value creation" meant to unprecedented possibilities. Formerly, the question was limited to what they refer to as "supply side" considerations, which meant carving up the multinational enterprise's operations into distinct functions (as was already the practice) and maybe tweaking the outcomes. In the context of the "digital economy", by contrast, "value creation" can seemingly take place anywhere, whether or not one of the enterprise's functions is located there. Hence, while "value creation" formerly did not really mean very much, there subsequently became no clear limit to what it might mean. From having been a rubric under which incremental changes to the system were being made in order to counter abuses, it became a rubric under which revolutionary changes, such as allocation of the tax base to market jurisdictions, were being considered.[21]

The starting point for this article is the observation that only very occasionally and obliquely has commentary on these developments had recourse to formal value theory in order to navigate a way through them. Becker and Englisch mention in passing in a 2019 article the current dominant value theory, i.e. marginalism, but without drawing much enlightenment from it.[22] Exceptionally, a more extensive discussion of the implications of marginalism was offered by Devereux and Vella, but in seeking to deploy it in defence of the idea of allocation of profits to market jurisdictions, they starkly illustrate its limitations in this context:

> From a standard economic perspective, it is simply incorrect to state that no value arises in the market. The profits being allocated among countries owe as much to the market as they owe to the various parts of a supply chain. Profit depends on the price charged at the point where supply and demand meet; it simply would have not arisen in the absence of a market. It is not entirely clear why the international corporate tax system should depart from a simple and uncontroversial economic understanding of value creation.[23]

The implication here seems to be that "economic substance" and marginalism can each found a claim to share in the allocation of the tax base. Recalling the principles of marginalism, however, this cannot have been intended to be taken seriously. Marginalism (a) treats value and price as synonymous, and (b) assumes that market actors have preferences based on marginal costs, marginal utility and so on, which preferences are capable of being expressed along a price curve. When market actors with different objectives meet (e.g. to buy a commodity on the part of one and, on the other, to sell that same commodity), their respective curves can be plotted together, and where the curves cross, that is where the "equilibrium" price is to be found. But these preference curves meet in an abstract numerical space posited by the assumptions of the theory, not on any piece of physical territory capable of having a share of the tax base allocated to it.

The contrasting "classical" tradition of value theory also barely features in the discussion. One notable exception is where Grinberg uses the labour theory of value associated with the classical tradition to satirize the OECD's attribution of profitability "to the labor of certain highly educated workers who occupy upper middle management roles – roles and back-

21. OECD, *Addressing the Tax Challenges of the Digital Economy, Consultation Document* (OECD Feb.2019), available at https://web.archive.org/web/20190314154014/https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.
22. J. Becker & J. Englisch, *Taxing Where Value Is Created: What's "User Involvement" Got to Do with It?*, 27 Intertax 2, pp. 161-171 (2019).
23. Devereux & Vella, *supra* n. 14, at p. 7.

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grounds broadly similar to those who negotiate transfer pricing rules for governments." He calls this the "bourgeois labour theory of value".[24]

Aside from these examples, however, expert commentary almost entirely eschews formal value theory as a means to investigate what is underlying the concept of "value creation" in discourse around international corporate tax reform. It is easy to see why this should be the case in the case of marginalism. The arm's length principle (which has been at the heart of the international tax system for nearly a century) provides that the pricing of an intra-group transaction ("transfer pricing") should correspond to the pricing at which the transaction would take place between independent enterprises. In other words, the outcome of the mechanism is already meant to be the same as the outcome that marginalist value theory would yield: essentially, a market price. To look to modern mainstream value theory as a guiding principle in a context where the arm's length principle is already being applied would therefore beg the question.

The classical alternative, by contrast, should in principle be more attractive, not least because (unlike marginalism) it claims to be able to objectively identify which activities are value creating. Or at least, the mainstream of the classical tradition makes that claim. It suffers, however, from the cosmetic defect (exacerbated perhaps by the way it is generally taught, i.e. as a developmental stage in the history of economics) of being perceived to have been proved wrong or superseded by marginalism. But this perception is false. While marginalism is overwhelmingly dominant from an institutional perspective, political economy in the broad tradition of David Ricardo and Karl Marx continues to develop to this day, and economics is still performed within its value-theoretical framework. The purpose of this article is to examine the rise and fall of the concept of "value creation" in international tax reform through the lens of that alternative value-theoretical framework.

But the argument in this article is more specific than that – it draws attention to two contrasting bodies of theory within the Marxist tradition that shed light on specific aspects the BEPS process: the "monopoly capitalism" school and "postoperaismo". In broad summary the argument is as follows. The "monopoly capitalism" school would have us situate value creation upstream in global value chains where material production processes are situated, while "postoperaismo" would have us situate it downstream in global value chains where consumption is situated. Since allocating profitability upstream would in many cases breach the boundary of the firm (i.e. in cases where production is outsourced, or where output is altogether "immaterial"), it was never in contemplation. And yet the international tax community embraced "postoperaismo" to the extent of accepting that profitability could be allocated downstream to where consumption is situated, notwithstanding that this too would involve breaching the boundary of the firm. This article concludes by placing this asymmetry in the context of inequalities between states.

Rather than comprehensively mapping the terrain of meaning of "value creation" in the BEPS process in pursuit of this argument, this article performs a detailed survey at a couple of key locations: (i) section 3. focuses on the early stages of the transfer pricing reform effected in connection with the OECD BEPS process, and (ii) section 4. focuses on the taxation of the digital economy as the debate over that issue was constituted in the run-up to the OECD's recent flurry of policy development in that area. The primary research materials

24. Grinberg, *supra* n. 4.

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considered in this article are the consultation documents issued by the OECD in relation to corporate tax reform, formal responses to those discussion drafts from business advisory firms and corporate lobbying entities, and (where particularly apposite) position statements and reports prepared for state actors. Analysis of the interventions from business advisory firms and corporate lobbying entities are a particular feature of this article: the literature surveyed for the purposes of this introduction tends to take the approach of seeking to interpret and critique the OECD's pronouncements, but the emphasis here is on "value creation" as a conceptual space in which the OECD and corporate sector representatives participated in a semi-adversarial, semi-cooperative negotiation. As regards methodology, sections 3. and 4. deploy close reading of the materials in question rather than, say, formal discourse analysis. By way of background, in section 2. there follows an introduction to the classical value-theoretical positions by reference to which those materials are subsequently analysed.

2. Classical Value Theory in the 21st Century

2.1. A brief introduction to classical value theory

A simple theory of value[25] might equate quantities of value with sums of money, in the sense that things are "worth" what we pay for them. When applied to business profits, this theory creates a paradox, however. A business creates its outputs by means of its inputs, and it pays for its inputs. If things are worth what we pay for them, then the price of its outputs should be the sum total of the price of its inputs. And yet, somehow, its outputs are (in general, supposing businesses to be generally profitable) worth more. It might be thought that the additional value comes from the work done to the inputs by the business in order to turn them into outputs, but that work is paid for in the form of wages just like any other input, and so is already accounted for. So where is the additional value coming from? Value theory in the classical tradition of political economy may be understood as an evolving approach to answering this conundrum.

The core difficulty in solving the conundrum is the absence of a yardstick for value that is independent of price (it being from the prices of things that the conundrum arises in the first place). One might suppose that a simple universal commodity might serve as yardstick for value, which is the approach David Ricardo sought to take, but he came unstuck dealing with the fact that different commodities are produced with different levels of capital intensity.[26] Karl Marx's insight was to adopt labour itself as the yardstick: not the infinite variety of concrete labour that is actually performed in production, though; rather, a fungible abstracted form of labour that is brought into existence by virtue of the market exchange of commodities ("socially necessary labour time"). The solution to the conundrum is that labour produces more value, in terms of socially necessary labour time, than it costs.[27]

To this day there are Marxist economists deploying this concept for the purposes of detailed modelling of capitalist economies, but generally at the expense of fidelity to Marx's origi-

25. In essence a mercantilist one: *see* Lars G. Magnusson, *Mercantilism*, in W. J. Samuels, J. E. Biddle, J. B. Davis, eds., *A Companion to the History of Economic Thought*, pp. 46-60 (Blackwell 2003).
26. *See* M. Dobb, *Theories of Value and Distribution Since Adam Smith* ch. 3 (Cambridge University Press 1973).
27. K. Marx, *Capital: a critique of political economy, volume I* (Penguin, 1976); *see* P. Mirowski, *More Heat than Light* (Cambridge University Press 1989) for a superb account of the classical value-theoretical tradition in its intellectual context.

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nating work. This is because of an apparent flaw in Marx's own modelling in volume III of *Capital* (likewise to do with the fact that different commodities are produced with different levels of capital intensity), which most Marxists in this tradition treat as in need of correction. Different approaches to this issue developed over the course of the 20th century, however, leading to a number of variants within this strand. Distinctions may be made, for example, between those who treat value and price as two separate systems and those who do not, and between those who model all the events in an economic circuit as taking place simultaneously, and those who do not.

A crucial feature of this mainstream Marxism is that (like the approach of its classical antecedents in Adam Smith and David Ricardo) what it analyses is the physical circuit of material commodities from production to exchange, and then back into production again, either as means of production or as means of subsistence for productive workers. This materialism – the recognition of a "production boundary"[28] around (broadly speaking) raw material extraction, agriculture, manufacture, and transportation – is in stark contrast to today's marginalist perspective where the ambit of value (being subjective) is coextensive with the entire market for goods and services.

Also seeking to model the surplus arising from the physical production of commodities but taking a different approach is the neo-Ricardian classical tradition adopted by the followers of 20th century economist Pierro Sraffa. From their perspective, Marx's value theory appears to be something in the nature of a wrong turn. They attack the problem raised by Ricardo directly, using sophisticated mathematical techniques to model surplus in terms of commodities themselves, rather than positing a universal yardstick of their value as Ricardo and Marx did. Sraffian models are not bedevilled by the mathematical wrinkles that arise when trying to apply Marx, and the Sraffian approach therefore caused a crisis in Marxian value theory in the 1970s when its full implications started to be felt.[29]

From this period of crisis emerged the increasingly dominant "value-form" school of Marxist theory, which takes a more philosophical approach, essentially treating the problems with which mainstream Marxism concerns itself as originating in a mistaken reading of Marx as a classical political economist rather than as a critic of classical political economy.[30] This school of thinking rejects the idea of value as something objectively produced by labour prior to being constituted as value in the mechanism of exchange, foregrounding instead the role of the market in bringing into being those relations that are predicated on the existence of "value" as a social substance. To that extent, the value-form interpretation of Marx has more in common with marginalism than other strands of thinking in the Marxian tradition, and in particular it does not recognize the aforementioned production boundary. These "market" approaches (i.e. marginalism and value-form Marxism) essentially treat the concept of value as playing a different role from the one it plays in classical theory – it is no longer being advanced as explanatory of surplus on a quantitative level.

28. *See* H. Boss, *Theories of Surplus and Transfer* (Unwin Hyman 1990).
29. P. Sraffa, *Production of Commodities by Means of Commodities* (Cambridge University Press 1960). *See also* I. Steedman, *Marx After Sraffa* (NLB 1977); I. Steedman & P. Sweezy, eds., *The Value Controversy* (Verso 1981); R. Hahnel, *Radical Political Economy: Sraffa versus Marx* (Routledge 2017).
30. For an overview of the core insights of this strand of value theory, *see* F. H. Pitts, *Critiquing Capitalism Today* (Palgrave Macmillan 2018).

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To be carried forward into the analysis from the foregoing overview are two concepts in particular. First, the idea of "market theories", i.e. marginalism and value-form Marxism: while – as already noted – they are of little practical use in the context of international corporate tax reform, they stand in notable contrast to the approaches that *do* bear upon the topic. And second, the idea of the classical "production boundary" around value-creating labour, as deployed in mainstream Marxism, which will come in useful throughout the article. But, as regards theoretical standpoints, of primary interest for the purposes of this article are two relatively fringe positions within the broader Marxist tradition that may be thought of as offshoots of mainstream Marxism: the "monopoly capitalism" school, and "postoperaismo". They will be discussed in detail below. By way of background to that discussion, however, it is necessary first to embark on a brief digression into a discussion of the role of intangibles in global value chains.

2.2. Global value chains and the smile curve

Global production today is often analysed by reference to the global value chain analytic, which follows production processes from the extraction of raw materials to the consumption of goods and services. A key feature of global value chains is that they take in the entire spectrum of possible relations between chain nodes: from being under common control within an MNE, through various alternative governance mechanisms (sector-wide standard-setting, for example), to contracting in an open market.[31] They are referred to as global *value* chains, specifically, because they are primarily concerned, on a quantitative level at least, with "value added", i.e. the profits plus the labour costs at each node in the chain, irrespective of their onward transfer into the hands of capital or labour. A crucial element of value chain analysis is the recognition that the largest-scale structural entity in the analysis is not the firm but the chain itself, insofar as control is exercised by MNEs ("lead firms", in value chain parlance) whether or not they own the means of production being operated, and employ the labour engaged, at any particular node in the chain.

A key feature of global value chains is the so-called "smile curve". The smile curve (illustrated in the figure) reflects the fact that generally speaking the global value chain nodes that add the *least* value in accounting terms are the nodes where actual processes of material production take place. Greater value added is achieved by the nodes whose role is in developing and designing products, and by nodes whose role is in marketing and advertising products, i.e. in all cases nodes associated with intangible assets. The curve is in the shape of a smile because R&D, design and so on, are figured as preceding production, while marketing, advertising and so on are figured as following production, with the materially productive activities apparently adding the least value in the centre of the curve where it is at its lowest point.

It is of course not the case that the further the immaterial processes are separated from the material ones along some meaningful dimension, the more value adding they are, and so the neatly smiling sides of the curve are a schematic artefact. Its core proposition – i.e. the dip in the middle – has strong empirical support, however.[32] This should not be controver-

31. G. Gereffi, J. Humphrey & T. Sturgeon, *The Governance of Global Value Chains*, 12 Review of International Political Economy 1, pp. 78-104 (2006).
32. M. Ye, B. Meng & S. Wei, *Measuring Smile Curves in Global Value Chains*, Institute of Developing Economies Discussion Paper. No. 530. 2015.8, available at https://web.archive.org/web/20170809192728/http://rigvc.uibe.edu.cn/docs/20160329210052329340.pdf.

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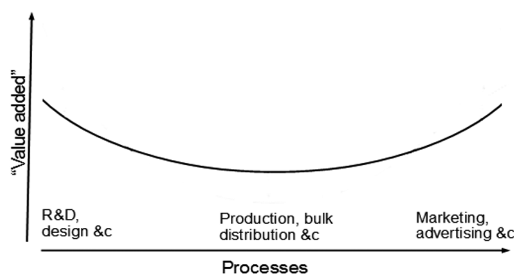
Figure 1 – The smile curve



sial, since it accords with the widespread observation that intangibles are of great significance in profitability today: insofar as business processes are disaggregated along global value chains, we would expect those nodes where the intangibles are deployed to "add" the majority of the total value added in the chain. Indeed, the smile curve is generally said to be *deepening*,[33] and this accords with the commonplace observation that intangibles are of *increasing* importance in today's global economy.[34]

For economists working in the marginalist tradition, and for Marxists of the value-form school (i.e. those with "market theories"), these phenomena are not of value-theoretical significance. In these approaches, value creation pervades the realm of market relations in a theoretically undifferentiated manner, and differentiations within that realm – such as the shape of the smile curve – must be attributable to something else. It is possible to respond to these phenomena as manifestations of the structural role of value in today's global economy, however, and two contrasting Marxian approaches respond in that way, i.e. postoperasimo, and the "monopoly capitalism" school. These contrasting approaches to value are considered in the subsections that follow.

2.3. Postoperaismo

Postoperaismo originated in Italian activist circles in the latter part of the 20th century but gained huge traction in the English-speaking world at the turn of the 21st century with the publication of *Empire* by Hardt and Negri.[35] For our purposes, the core insight of this school is the severing it identifies between the quantitative concerns of conventional Marxist value theory and the role in the modern global economy played by what it labels "immaterial labour" (i.e. labour "that produces the informational and cultural content of the commodity" as distinct from the commodity's material properties: its substance, form, location and so on).[36] It therefore speaks directly to the structural phenomena identified in section 2.2., i.e. the growing role of intangible assets at the expense of material production.

Postoperaismo's core contention in this context – that there are categories of wage labour or categories of commodity where there is no quantitative relation between, on the one hand,

33. OECD, *Interconnected economies: benefiting from global value chains* (OECD 2013), available at https://web.archive.org/web/20180717095003/http://www.oecd.org/sti/ind/interconnected-economies-GVCs-synthesis.pdf.
34. J. Haskel & S. Westlake, *Capitalism without Capital* (Princeton University Press 2018); *see*, in particular, ch. 2.
35. M. Hardt & A. Negri, *Empire* (Harvard University Press 2000).
36. M. Lazzarato, *Immaterial Labour*, in P. Verno & M. Hardt, eds., *Radical Thought in Italy: A Potential Politics*, pp. 132-146, p. 134 (University of Minnesota Press 1996).

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the labour (waged or otherwise) that goes into making the commodities desirable and, on the other hand, the volume of the commodities undergoing exchange – is manifestly correct. The labour that goes into digital commodities, for example, bears an arbitrary relation to the number of units of that commodity available for sale.[37] For authors of this school, who proceed on the (prima facie, quite reasonable) assumption that value theory is necessarily quantitative in its purpose,[38] this "crisis of measurability"[39] means that value theory has to be left behind altogether. In Hardt and Negri's analysis, value permeates our cultural and informational lives, but in doing so, loses its distinctiveness as something measurable that emerges from the relationship between labour and capital.[40] It may be noted that a key implication of the arguments of postoperaismo around immaterial labour is that it takes place throughout culture rather than exclusively pursuant to the wage relation – all of consumer culture is implicated in the co-constitution of value as understood in this way.[41] Thinking along these lines is particularly well illustrated by the claim, popular amongst Marxists working in this tradition, that social media use during leisure time creates value.[42]

But as a critique of traditional Marxist standpoints, postoperaismo is misconceived. Phenomena that merely have a causal relationship to the desirability of a commodity, whether or not they involve wage labour, are to be distinguished from labour that is quantitatively value-creating, because (as explained above) the purpose of the concept of value is to be explanatory of surplus, and the conundrum of surplus only arises where there exist the quantitative constraints that are absent in this context. Marx himself draws the distinction between phenomena that are merely causal and phenomena that are quantitatively implicated and therefore value creating by using the vivid analogy of a match lighting a fire. The fire's heat is caused by the match, but the amount of heat generated by the fire comes from the amount of fuel thereby caused to burn.[43] (This distinction between the causes of profitability and the factors that are quantitatively implicated in it will be of major and recurring importance in this article's discussion of BEPS.)

As regards the profitability of businesses that seem to be, as it were, all match and no fuel, all cause and no quantitative relation – i.e. generating huge profits through the deployment of intangible assets – Marx was very clear that the theory of value he was developing was a theory of the *underlying source* of capitalist surplus, "*regardless of its particular* forms as profit, interest, ground rent, etc".[44] Accordingly, the question of whose hands the money ends up in is a separate one from the question of where the value is created. To adopt a simple illustration using the categories Marx mentions in the quotation above – i.e. profit, interest and rent – an individual asset-owner can make an accounting profit even though it employs workers not quantitatively implicated in the surplus value embodied in commodities – a bank for example – while tremendous amounts of value can be created by the

37. Some debate exists over whether information commodities might be of a value that *tends towards* zero (as opposed to being zero), on the basis that some quantity of labour is required to produce the information, and that quantity is smaller and smaller per unit as units are replicated; *see* in particular B. J. Parkhurst, *Digital Information and Value: A Response to Jakob Rigi*, 17 tripleC 1, pp. 72-85 (2019).
38. Pitts, *supra* n. 30, at p. 163.
39. C. Marazzo, *Capital and Language* p. 43 (Semiotext(e) 2008).
40. M. Hardt & A. Negri, *Commonwealth* pp. 132-31 (Harvard University Press 2009).
41. F. Berardi, *The Uprising: on Poetry and Finance* p. 87 (Semiotext(e) 2012).
42. A prominent author in this strand is Christian Fuchs, who has written extensively on this subject; see in particular C. Fuchs, *Digital Labour and Karl Marx* (Routledge 2014).
43. K. Marx, *Capital: a critique of political economy, volume II* pp. 207-8 (Penguin 1978).
44. K. Marx & F. Engels, *Marx and Engels Collected Works vol 42* p. 407 (Lawrence & Wishart 2010).

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workers employed at a factory that nonetheless makes an accounting loss because payments of interest and rent exceed what would otherwise be its profits. The same phenomenon may be understood as being at work in the modern digital economy, only with intangible profit drivers of a more diverse kind than the purely financial ones to which a bank's profitability is attributable. Where a profitable business is all match and no fuel, the implication is that the fuel (i.e. the value creation) is simply elsewhere.

That being the case, the postoperaist perspective has been vigorously contested from a mainstream Marxist standpoint[45] (and indeed from a value-form standpoint, albeit with a different set of arguments in that context),[46] and should therefore be understood to be a fringe value-theoretical position even within the already wholly heterodox Marxist tradition. A more conventional Marxist approach would be to see the upturned sides of the smile curve as constituting a huge increase in the preponderance within capitalism as a whole of "unproductive" labour i.e. labour that does not create value. The school of Marxist thinking which has the most compelling narrative around the structural role of such labour is the one which sees it as implicated in value *capture*, through the mechanism of monopoly power.

2.4. Monopoly power and "unproductive" labour

The concept of monopoly power as deployed in this article is a broad one, referring not only to cases in which a market has a single seller, but to dominance in all cases of market imperfection: oligopoly, monopsony, oligopsony, control over market access and indeed any exploitation of an advantageous position vis-à-vis a market insofar as it evinces some sort of asymmetry or barrier to entry. Monopoly power is an endemic feature of the real-world business environment. An oft-encountered kind of monopoly power in consumer markets is oligopoly – the dominance of a small number of players. Members of an oligopoly can extract excess profits without forming a formal cartel by each unilaterally taking a strategic decision not to compete with the others on price.[47] And even where they appear to be competing with each other on price, they might nonetheless be benefiting from oligopsony[48] vis-à-vis their suppliers; suppliers who cannot get their product to market except through the "choke point"[49] of the oligopoly.

A key element in monopoly power since the 19th century has been the deployment of intellectual property, which is of course a literal monopoly in the sense that it confers on its owner a state-enforced right to exclude others from making commercial use of it, although its role is often to embed and enhance monopoly power in circumstances of competition with other market participants. Apple's hardware, for example, is so profitable in part because of Apple's technical innovations, and in part because of its attractive product design, and these elements are held together by a carefully curated brand. All of these features of its hardware business are underpinned by formal monopolies over intellectual property.

45. *See*, for example, G. Caffentzis, *In Letters of Blood and Fire* pp. 95-123 (PM Press 2013).
46. *See*, for example, Pitts, *supra* n. 30, at pp. 191-219.
47. P. Baran & P. Sweezy, *Monopoly Capital* (Monthly Review Press 1966).
48. R.D. Blair & J.L. Harrison, *Monopsony in Law and Economics* (Cambridge University Press 2012).
49. F. Guy & P. Skott, *Technology, Power and the Political Economy of Inequality*, in U. Mattei & J. D. Haskell, eds., *Research Handbook on Political Economy and Law* pp. 105-119 (E. Elgar 2015).

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Another role that intellectual property can play is in encroachments of monopoly power from one sphere to another. Google and Facebook have monopolized our attention in various ways, primarily in (respectively) web search and social media, and they are thereby enabled to exercise immense monopoly power in the online advertising market. These kinds of deployments of intellectual property are not new – consider for example the phenomenon of the free newspaper funded through advertising – but the "digital" or "information" sphere creates unprecedented opportunities for enhanced or novel forms of encroachment of monopoly power from one sphere to another. Google and Facebook represent an advance on the free advertising newspaper model, for example, because of the targeted nature of their advertising based on the data they hold on us. More generally, intellectual property is instrumental in exercising monopoly power through the "network effect", i.e. a circumstance where something becomes more valuable to its users as a function of the number of users it has.

Public concern regarding monopoly power ebbs and flows with the evolution of national economies generally. Around the turn of the 20th century, in the United States, at the birth of the modern competition law regime, the concern was with giant "trusts" that deployed aggressive monopolistic practices to corner markets in basic commodities such as oil and steel.[50] There was an uptick in interest in monopolies in the 1960s, again in the United States, in connection with oligopolistic practices among manufacturers of high-value consumer goods such as motor cars.[51] In the United Kingdom in the 2000s, awareness grew of oligopsony among supermarkets, and the adverse impact it had on farmers.[52] Currently there are concerns about the network-effect-related monopoly power exercised by "platform economy" websites such as Uber and Airbnb.[53]

The phenomenon is, however, simply an endemic feature of real-world markets generally: the accruing of enhanced profitability to some market participants *at the expense of others*, with the implication that at least some of the profitability of a given business (and in some instances most or all of it) may reflect capture by the firm in question of value created elsewhere. The smile curve, then, is consistent with the proposition that it is not necessarily to the owners of means of production that surplus value accrues but to the various kinds of monopolists that dominate global value chains. Profits at the global value chain nodes where means of production are owned may therefore be understood to be suppressed by monopoly power (hence the dip in the curve), and by the same token, material goods and services produced otherwise than for final consumption (raw materials, intermediate goods, wholesale goods, bulk transportation and so on) systematically sell at an undervalue.

It is on this basis that *all* the value in the system may be understood to be produced at those nodes that are within the classical production boundary, at the bottom of the smile curve, notwithstanding that the value mostly accrues as profit in other nodes elsewhere in the global production network. The value left unaccounted for by those suppressed prices at the bottom of the smile curve has to accrue somewhere, and the question of where is determined by the question of who is exercising market power. Therefore, there is increasingly a tendency for capitalists to invest in labour that does not create value, but which instead

50. M. Josephson, *The Robber Barons: The Great American Capitalists, 1861–1901* (Harcourt 1934).
51. Baran & Sweezy, *supra* n. 47.
52. J. Blythman, *Shopped: The Shocking Power of British Supermarkets*, 2nd edition (Harper 2005).
53. N. Srnicek, *Platform Capitalism* (John Wiley & Sons 2016).

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generates and enhances assets that may be instrumentalized in its capture: labour that from a classical value-theoretical perspective is "unproductive", much though it may be causally implicated in profitability. We are therefore in theoretical territory, chiming with the "monopoly capitalism" school of Marxian analysis.

Like the mainstream Marxism from which it is an offshoot, the monopoly capitalism school takes a materialist approach to value, regarding it as being physically embodied in commodities. Unlike mainstream Marxism, however, which treats value as having a modellable relationship with price, the monopoly capitalism analysis views prices as having become unanchored from value altogether, insofar as they are either so inflated or so suppressed by power relations of various kinds that the quantitative relation becomes qualitative for analytical purposes.[54]

The picture painted by Baran and Sweezy in the founding text of this school[55] is of a world in which oligopolies emerge in markets where the largest players preserve their excessive profits by choosing not to compete on price, instead investing increasing amounts of capital in operations such as marketing, advertising, branding and product design (i.e., from a classical value-theoretical perspective, non-value-producing business functions – "unproductive" labour, in other words), in order to compete with each other in other ways. Baran and Sweezy focused on the national economy of the United States, and on players that generally owned means of production within the group, selling at monopolistic prices commodities they themselves manufactured. But the smile curve may be understood as illustrating a comparable mechanism at play on a global scale, provided (and this is a point of key importance for present purposes) one takes the entire global value chain rather than the individual lead firm as the unit of analysis. Lead firms in the chain invest primarily in non-value-producing functions so as to achieve maximum profitability through the exercise of monopoly power, the only difference from the monopoly capitalism paradigm being that there is no presumption that the value-producing but non-profit-generating functions are in-group.

It may be noted that the monopoly capitalism school is, like postoperaismo, considered to be on the fringes of mainstream Marxism. This is not, however, because of a difference in perspective regarding where and how value is created. It is rather to do with technically unorthodox conceptions of surplus, and of the relation between unproductive labour and the putative tendency of the rate of profit to fall, in Baran and Sweezy's foundational exposition.[56] The observations made in this article that adopt a monopoly capitalism perspective are not in themselves inconsistent with a mainstream Marxist perspective.

2.5. Allocation implications

Before turning to the question of corporate tax reform, some observations about the allocation implications of the foregoing may be made. The vast majority of the world's population live in states with a GDP per capita that is very substantially below the GDP per capita

54. *See* J. B. Foster, *The Theory of Monopoly Capitalism* (Monthly Review Press 2014) for an overview of this understanding of capitalism.
55. Baran & Sweezy, *supra* n. 47.
56. *See* E.K. Olsen, *Productive and Unproductive Labour*, in D.M. Brennan, ed., *The Routledge Handbook of Marxian Economics* p. 129 (Routledge 2017), and Foster, *supra* n. 54, at ch. 2, 4 & 5; for an overview of the wider theoretical issues at play, *see* M.F. Bleaney, *Underconsumption Theories* (International Publishers 1976).

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enjoyed in the rich countries of the global north. Further, those lower-income states are almost exclusively states that have a proportion of the workforce employed in raw materials extraction, agriculture and manufacture that is substantially *higher* than the kinds of proportion generally found in the higher income states.[57] Or, to put it more simply, from the point of view of headcount, the business functions at the low point at the centre of the smile curve are disproportionately located in poorer countries, and the activities up the sides of the smile curve are disproportionately located in wealthier countries. From the point of view of payroll, of course, that effect will be hugely magnified, because of the higher cost of labour in wealthier countries generally, to be contrasted with the low-wage nature of manual labour within the classical production boundary, particularly where it takes place in low-income countries.

This means that, if value is understood as being created at the bottom of the smile curve and captured by the exercise of instruments of monopoly power (rather than being created throughout the sphere of market relations as market-based theories of value such as marginalism and the value-form interpretation of Marxism would have it), value is being disproportionately created by hyper-exploited labour in poorer countries, and disproportionately captured in richer countries.[58] This analysis is in marked contrast to the perspective adopted in postoperaismo, whereby the increased profitability associated with intangibles is referable to the co-constitution of value by the workers who are paid to generate intangible assets and by the consumers who respond to them. In other words, postoperaismo seems to obscure the role of hyper-exploited labour in low-income countries, and the monopoly capitalism approach foregrounds it.

Even without the lens of economic justice, however, it is clear that, while market-based theories of value have no other story to tell about these kinds of dynamics than is told by market pricing, postoperaismo has its gaze drawn downstream in global value chains towards the realm of consumption, while approaches such as mainstream Marxism and the monopoly capitalism school, which see only activities within the classical production boundary as explanatory of surplus, are looking upstream in global value chains. It is with that contrast in mind that we turn to the discussion of "value creation" in international corporate tax reform discourse.

3. "Value Creation" and Transfer Pricing Reform

3.1. The arm's length principle and offshore residual profits

3.1.1. "Synergy": Monopoly power vs theory-of-the-firm accounts

The principle at the heart of the international corporate tax system, the "arm's length principle", provides that cross-border dealings between entities under common control should be adjusted for tax purposes so that they are priced as they would be if they were not under common control (i.e. "market" prices). A major difficulty with this approach is the phenomenon of residual profit, as succinctly pointed out by Collier and Andrus:

> [T]he MNE group of companies is not simply an amalgam of separate legal entities each of which necessarily has a stand-alone and independent counterpart operating in the market, nor are all MNE transactions and arrangements necessarily mirrored in the market. What this means is

57. The empirical claims made here are uncontroversial and may be readily borne out with data from the International Labour Organisation, the Word Bank and so on.
58. *See* J. Smith, *Imperialism in the Twenty-First Century* (Monthly Review Press 2016).

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> that an economic slicing of MNE transactions into "market" components will not necessarily allocate *all* of the group profits of an MNE to individual group members. [Emphasis added.][59]

Broadly, the system as Collier and Andrus describe it is one whereby group entities actually performing business functions are treated as operating as independent participants in markets for routine outputs – markets that are presumptively competitive in nature and therefore permit only tightly constrained margins – with a substantial residual group profit going untaxed because it is structured to arise offshore.[60] The question then arises of where this offshore residual profit comes from.

Clearly, one viable explanation for the existence of offshore residual profits is that, while the group entities actually performing business functions are treated as operating as independent participants in competitive markets for routine outputs, the group as a whole is exercising monopoly power, with the consequence that the offshore residual profits constitute value capture in purified form. This is a possibility that has been recognized[61] since the embryonic phase of the international corporate tax regime; consider for example this observation made in the report commissioned by the Fiscal Committee of the League of Nations in the early 1930s:

> It is not possible to say that one establishment has procured a certain profit because that establishment may only serve to suppress a dangerous competition for the establishment situated in another country. In this case, the accounts of the establishment will most frequently show a deficit whereas in reality it will have contributed to increasing the turnover of the other establishments, and consequently; the general profit.[62]

Monopoly power is not the only possible explanation, however. There exists a substantial body of learning dedicated to the question of why enterprises controlled on a top-down basis even exist, given the supposed power of markets to produce optimal results. That body of learning – known as the "theory of the firm" – can offer a variety of alternative answers to the question of where such offshore residual profit might come from. Many of these answers are a variation on the theme that market transactions give rise to costs that can be eliminated through organizational control, shared knowledge and so on.[63] These answers are not a complete answer, however. In particular, the theory of the firm should not be understood as a *substitute* for the explanation that excess profits might arise from monopoly power. The best that can be said of theory-of-the-firm explanations for the existence of offshore residual profits is that transaction cost phenomena might mean that monopoly power exercised by the group as a whole does not account for those offshore residual profits *in their entirety*. Offshore residual profits as a generalized phenomenon may well include organizational transaction cost savings, but that does not exclude the possibility that they comprise, at least in part or even predominantly, monopoly rents.

Theory-of-the-firm approaches do play a key rhetorical role, however, which is to obscure that possibility that offshore residual profits comprise monopoly rents. There is a marked tendency to (a) bundle up explanations for the phenomenon of residual profit under the

59. R. Collier & J. Andrus, *Transfer Pricing and the Arm's Length Principle After BEPS* ch. 2 para. 26 (2.26) (Oxford University Press 2017).
60. *See* id., at 2.85, 3.13. and 3.39-40.
61. With the proviso that we are here talking about economic rents derived from monopoly power as understood in mainstream economics as opposed to the kind of value capture discussed in section 2.4.
62. Cited by Collier & Andrus, *supra* n. 59, at 1.91.
63. For a survey of mainstream theories, *see* P. Walker, *The Theory of the Firm* (Routledge 2017).

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label "synergies", which has a positive rhetorical force suggestive of earned additional profits, and (b) nonetheless to include in the "synergies" bundle the possibility that the profits in question are monopoly rents (to the extent that possibility is acknowledged at all). A particularly stark example is to be found in chapter 4 of Collier and Andrus:[64]

> If all interactions between the constituent entities of an MNE group were precisely priced on an arm's-length basis and determined by reference to the prices charged between comparable independent entities that do not share in the synergistic benefits of group membership, the sum of the resulting profits would not include the amount of any synergistic benefits that arise from operating as an integrated MNE group. [...]
>
> A straightforward example of this problem is presented by the operation of a centralized group purchasing function. Combined group purchasing can, in some cases, create market power that enables negotiation of more favourable prices by the combined group. [...] The difficult transfer pricing question is to which group member or members these synergy-enhanced group profits should be allocated.

As we shall see, this concept of "synergies" as a euphemistic tactic for eliding economic rent into transaction cost savings is encountered often. If the theory-of-the-firm literature is actually confronted, however, a curious outcome emerges. This exercise has been undertaken by Tavares.[65] He contends that the evolving approaches taken by the international community to the tax problems thrown up by the phenomenon of MNEs track the evolution of the theory of the firm, and he draws parallels between the present state of the theory of the firm and the notion of "value creation" as it appears to be used in the BEPS process. He goes on to deploy that theory to show how a hypothetical MNE can be analysed into component "firms" that account for where the value is being created, but he accepts that this may not be the full story:

> US shareholders who invested in the overall MNE would remain as the ultimate risk-taking entrepreneurs of the unified MNE operations, and accordingly any residual profits, synergetic gains or economic rents over and above the normal return for the operations of the "firms" identified above, should accrue to such US shareholders.

The idea of allocating residual profits to shareholders derives from a body of theory-of-the-firm literature regarding the separation of ownership and management that articulates the theoretical benefits of having shareholders in a non-operational role as residual risk-bearers.[66] Leaving aside the question of whether allocation of residual profits to shareholders has merit on this theoretical basis, it should be noted that the shareholders are not actually an element of the firm at all – and there is no reason to suppose that the allocation of profit to shareholders would necessarily allocate it to a jurisdiction in which the firm would have a tax footprint under ordinary principles (Tavares skirts this problem by means of an assumption that shareholders are residents of the group's parent entity's jurisdiction).

What this points to is something which, if expressed in more general terms, is a core contention of this article: *if you are to properly theorize the residual profit of a multinational corporate group after profits have been allocated to its component entities, you have to confront the possibility that the residual profit should be allocated outside the group altogether.* Tavares implicates shareholders, but recognizing the phenomenon of monopoly power exercised

64. Collier & Andrus, *supra* n. 59, at 4.08 and 4.09.
65. R. Tavares, *Multinational Firm Theory and International Tax Law: Seeking Coherence*, 8 World Tax J. 2, pp. 243-276 (2016), Journal Articles & Opinion Pieces IBFD.
66. *See*, in particular, E.F. Fama & M.C. Jensen, *Separation of Ownership and Control,* 26 Journal of Law and Economics 2, pp. 301-325 (1983).

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over supplier firms in global value chains would implicate those firms, and (as we shall see) users of social media and online retail have been implicated insofar as they generate data. Given allocations of this kind are impossible under the arm's length principle, however, we should not be surprised to discover that any attempt to theorize residual profit *specifically for the purposes of the arm's length principle*, whether it be under the rubric of "value creation" or any other rubric, reproduces the very problem it sets out to solve.

3.1.2. Causal v. quantitative relations and the "alchemy" of intangibles

In common with Tavares, Collier & Andrus do not go as far as to expressly articulate this problem, but their analysis teases out some underlying themes in the OECD's approach to the fact that it is an insoluble problem, and in particular they note the following:

> The question comes to the fore particularly in the services area, in determining when a group member should be compensated by another associated enterprise for benefits flowing from group membership. Paragraph 7.13 of the 2010 OECD Guidelines states that:
>
> > [A]n associated enterprise should be considered to receive an intra-group service when it obtains incidental benefits attributable solely to its being part of a larger concern, and not to any specific activity being performed. For example, no service would be received where an associated enterprise by reason of its affiliation alone has credit-rating higher than it would if it were unaffiliated, but an intra group service would usually exist where the higher credit rating were due to a guarantee.
>
> The Guidelines thus try to draw the line between when compensation for synergistic benefits is required and when it is not by asking whether some overt action was taken to create the benefit.[67]

In this idea of "some overt action" there is more than a mere echo of the conflation of (a) mere causation and (b) quantitative implication that is so polarizing in the value-theoretical debates noted in section 2.3. Where the preconceptions in operation have the consequence that value appears to come out of nowhere, and its existence nonetheless has to be accounted for, then the temptation will always be to look for *something* to which it may be attributed, even at the cost of no longer requiring that the thing to which it is attributed be proportionate to the value that arises.

A telling illustration from the OECD is their 1979 recommendation that tax authorities should address the legitimacy of interest payments to offshore lenders by looking at where the loan agreements were negotiated; a recommendation which, as Collier and Andrus point out, was subsequently applied by analogy to a variety of contexts.[68] The recommendation is ultimately baseless, however. When the nature of interest income is considered, there does not appear to be any substantive link between the act of negotiating the loan and the "value" accruing to the lender in the form of interest. The interest arises by reference to the principal advanced and not by reference to the labour of the finance workers on the deal: the question of where the value originates on a quantitative level pre-exists their causal labour. (This issue of causal versus quantitative relations – which, as noted in section 2.3., was correctly identified by the postoperaists as a central issue for those who seek to understand surplus as it is manifest in the form of profitability today – will be a recurring theme in the remainder of this article.)

67. Collier & Andrus, *supra* n. 59, at 4.11 and 4.12.
68. Collier & Andrus, *supra* n. 59, at 2.52.

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In many ways the most tempting in-group causal phenomenon to which to attribute residual profit on a conceptual level is intangible assets. The category of intangibles does, after all, include the asset value accounting sweep-up of "goodwill", and narratives around the profit-generating power of identifiable intangible assets – brands, patents, algorithms, data and so on – are intuitively plausible and persuasive. Further, most kinds of intangible asset implicate labour (or can be made to implicate labour) in their creation and maintenance. The disadvantage of allocating profitability to intangibles (or advantage, depending on whether you view it from the perspective of the state or capital) is that intangible assets can be shifted offshore at low values,[69] and that is one of the principal mechanisms that has the consequence of residual profit arising there. As Collier and Andrus explain:

> A taxpayer may arrange its contracts in such a way that a low-function, low-tax entity is assigned the entrepreneurial risk taking role in an intangible development undertaking. Even if it lacks the autonomy to make its own investment decisions, such an entity can be imbued with enough substance to withstand challenges based on transactional recharacterization and in that way assume the right to the fruits of successful intangible development projects. The interaction of contractual assignments of risk, characterization of research or marketing arrangements as a limited risk provision of services by the party performing most or all of the business functions, and the transfer of investment capital to low-tax locations can combine to generate hard to challenge claims to the fruits of research by low function associated enterprises in low-tax jurisdictions.

As is clear, structuring to achieve this outcome is a technical matter, but it accords with the magical thinking regarding the source of profitability that may be found anywhere outside formal political economy. As the author of the League of Nations report put it some 85 years ago:

> There is apparently no theoretically perfect rule for determining exactly how much of the income is attributable to each establishment any more than there is an accurate way for apportioning the compensation of an individual workman to his hands and his feet, and to his brain which has coordinated all his efforts. Income is sometimes classified, for tax purposes, as income from capital, income from work, and income from work and capital combined, the profits of an industrial and commercial enterprise being included in the last mentioned category. It is obvious that the proportion of work to capital varies from business to business and that, in the alchemy of a successful business, the intangible, immeasurable element of brainwork is a very important factor, if not the most vital factor.[70]

If a group can situate this imagined "alchemy" offshore – and, as Collier and Andrus explain, to a very substantial extent it can – that is where the arm's length principle as at July 2010 would allocate the profits for tax purposes. And it was in order to address that problem that the concept of "value creation" was introduced to the world of transfer pricing norms.

3.2. "Value creation" and the transfer pricing of intangibles before BEPS

3.2.1. The 2010 scoping exercise: Intangible assets vs "exotic value drivers"

The concept of "value creation" was not entirely unheard of in formal transfer pricing norms as at 2010; it appears on p. 102 of the OECD's 2010 edition of their transfer pricing guidelines, not as the guiding principle it subsequently came to be but, rather, deployed in passing as if readers would already be familiar with the concept.[71] Even as those guidelines

69. Collier & Andrus, *supra* n. 59, at 3.45-47.
70. Cited by Collier & Andrus, *supra* n. 59, at 1.86.
71. OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* p. 102 (OECD 2010), available at https://www.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2010_tpg-2010-en.

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were being published, however, the process that would eventually become the BEPS project was already under way, with the invitation being issued on 2 July 2010 for interested parties to comment on the scoping of a future project on the transfer pricing aspects of intangibles.[72]

A dominant theme in the responses is the monopoly power problem, which is considered to be a structural driver by the "monopoly capitalism" school of Marxian political economy, with some respondents – at this stage at least – expressly articulating it in terms. The Institute of Chartered Accountants of England and Wales (ICAEW) explains that "the nature, and aim, of many companies with world leading brands is to be the number one participant in any geographical country/area in relation to their (branded) product. The inevitable consequence of that is that there are unlikely to be comparable products in respect of which the [Comparable Uncontrolled Price] method can be easily applied".[73] Transfer pricing consultant Ross Newman expressly characterizes the non-market proceeds of this kind of positioning as "rent", complaining about the "lack of adequate guidance to deal with cases in which a company owns a non-routine intangible that allows the company to generate an economic rent *i.e.*, a source of exceptional profitability relative to other firms in the same industrial sector".[74] Some respondents even offer taxonomies of how monopoly rents are acquired: both Ernst & Young and the OECD's own Business and Industry Advisory Committee (BIAC) offer lists of quasi-asset intangibles that include "economies of scale", "barriers to entry", "first mover advantage" and "group network attributes".[75]

In addition, there is a remarkable degree of frankness in the responses about the possibility that profitability potentially attributable to "intangibles" is simply a residual excess profitability that arises in MNEs as a consequence of their structural positioning. "These 'intangibles'", writes Canadian tax lawyer J. Scott Wilkie (albeit with a subsequent nod to the theory-of-the-firm account as opposed to that of monopoly power), "manifest the essence of the residual profitability of a multinational enterprise and in many ways define its distinctive character. In short this is the 'elephant in the room' concerning the potential effectiveness of the revised Transfer Pricing Guidelines".[76]

What is at first glance surprising is that some respondents go so far as to urge that the phenomenon of monopoly rents be formally investigated, as such, as part of the OECD's work on the transfer pricing of intangibles. PwC responded "that it would be helpful if WP6 [i.e.

72. OECD, *OECD Invites Comments on The Scoping of its Future Project on The Transfer Pricing Aspects of Intangibles* (OECD 2010), available at https://web.archive.org/web/20170417104243/http://www.oecd.org/tax/transfer-pricing/oecdinvitescommentsonthescopingofitsfutureprojectonthetransferpricingaspectsofintangibles.htm.
73. ICAEW, *Memorandum submitted in August 2010 to OECD by the Tax Faculty of the Institute of Chartered Accountants in England and Wales in response to a request for comments on future OECD work in this area* (OECD 2010), available at https://web.archive.org/web/20181201163014/http://www.oecd.org/tax/transfer-pricing/45895914.pdf.
74. Altus Alliance, *Comments on Chapters VI and VIII of the OECD TP Guidelines* (OECD 2010), available at https://web.archive.org/web/20181201082956/http://www.oecd.org/tax/transfer-pricing/46018080.pdf.
75. Ernst & Young, *Ernst & Young's response to the OECD's invitation to contribute to defining the scope of its project on the Transfer Pricing Aspects of Intangibles* (OECD 2010), available at https://web.archive.org/web/20181201151734/http://www.oecd.org/tax/transfer-pricing/46020216.pdf; and BIAC, *BIAC Responses to the OECD Questions for Purposes of Scoping an OECD Project on Intangibles* (OECD 2010), available at https://web.archive.org/web/20181201124140/http://www.oecd.org/tax/transfer-pricing/46026029.pdf.
76. J.S. Wilkie, *J. S. Wilkie submission to OECD consultation* (OECD 2010), available at https://web.archive.org/web/20181204101651/http://www.oecd.org/tax/transfer-pricing/46027879.pdf.

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the OECD working party tasked with this area of policy development] considered the issue of economic rent and, in particular, consider whether it would be appropriate to set out some of the principles involved".[77] The reason this is at first glance surprising is because it appears to run counter to the revenue interests of the corporate sector. If the capacity to capture value reflected in part in the phenomenon of residual profitability is analysed as an asset, the residual profitability would become income referable to that asset, which would then (if it is to make its way into a low-function low-tax entity) have to be properly paid for in accordance with the arm's length principle. The mechanism of simply permitting it to arise offshore by default once all market-value transactions are accounted for would consequently cease to be available.

Unsurprisingly, this is not the direction of travel to which the responses generally point. It is clear from the responses that the problem being adverted to here is that tax authorities were *already* seeking to make groups pay for these notional monopoly power assets, and the call for the OECD to define them is a call for them to be defined *out* of existence for transfer pricing purposes. This is an endemic feature of the responses, and the anxiety over the point among respondents deserves extensive illustration:

"What is an intangible?", ask AstraZeneca, "(and by association, what isn't an intangible)" they add, going on to elaborate that "assets should not be 'created' by tax authorities through the bifurcation of tax payers' commercial arrangements".[78] Ernst & Young want to be sure that the OECD treat it as within their purview to define "what intangibles are subject, and – maybe even more – are not subject to transfer pricing".[79] PwC ask "How to separate factors which, whilst not tangible, are not 'intangibles'?", since, "A number of countries in our network reported that tax authorities sometimes try to take a very broad view of what might be an intangible and then use that either to attempt to enforce a transfer pricing adjustment or to try to force the use of the profit split method".[80] "At a minimum," says the Tax Executives Institute (TEI), "the OECD should provide examples of intangible property that is not capable of being transferred per se and thus should not require compensation in connection with a business restructuring or other transaction".[81] "It will be [...] critical to articulate what is not covered by the Project" say Baker & Mackenzie, "[o]therwise, the Project could easily be misunderstood as endorsing either unprincipled pricing approaches inconsistent with the arm's length principle or an indeterminate expansion of taxing jurisdiction".[82] "We are concerned", write the Institute of Chartered Accountants of England and Wales, "that there is sometimes a belief that anything that is not tangible must be an intangible and have a value attaching to it […] We are also concerned that some tax authorities argue for an ever increasing range of 'soft' intangibles and ascribe a value to them in order to enhance their tax revenues".[83]

77. PwC, *Transfer Pricing Aspects of Intangibles: Scope* (OECD 2010), available at https://web.archive.org/web/20181202072734/http://www.oecd.org/tax/transfer-pricing/46043673.pdf.
78. AstraZeneca, *Transfer Pricing Aspects of Intangibles: Project Scoping* (OECD 2010), available at https://web.archive.org/web/20181201084333/http://www.oecd.org/tax/transfer-pricing/46025487.pdf.
79. Ernst & Young, *supra* n. 75.
80. PwC, *supra* n. 77.
81. TEI, *Re: Transfer Pricing Aspects of Intangibles* (OECD 2010), available at https://web.archive.org/web/20181204074012/http://www.oecd.org/tax/transfer-pricing/46019971.pdf.
82. Baker & Mackenzie, *Re: Transfer Pricing Aspects of Intangibles* (OECD 2010), available at https://web.archive.org/web/20181204095547/http://www.oecd.org/tax/transfer-pricing/46025552.pdf.
83. ICAEW, *supra* n. 73.

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What is being sought here is seemingly an international norm as regards what constitutes an intangible asset, leaving outside that boundary other intangible "value drivers": "exotic value drivers", as they are referred to by one respondent.[84] This label, "exotic value driver", may usefully be adopted here to refer to the putative intangible assets that are (a) associated in this article with the residual profitability attributable at least in part to monopoly power, and (b) of debatable status as assets for transfer pricing purposes. As regards precisely where and how this boundary between intangible assets and exotic value drivers should be drawn, respondents say very little, aside from to plead for clarity to the effect that the boundary should and does exist (and, therefore, by implication, that a portion of residual profitability should be reserved offshore).

In one case there is a suggestion that juridical ontology should be adopted as a model for where the boundary should be placed, with the respondent making reference to "legally protected intangible property"[85] as a contrasting category to exotic value drivers. This represents perhaps the most aggressive possible stance on the part of corporate sector respondents. The category of intangibles is ineluctably characterized by its inclusion of a nebulous range of assets including formal legal monopolies at one end of the spectrum and concepts as vague as "profit potential"[86] at the other, and the boundary between assets that do and do not exist for transfer pricing purposes is inevitably going to have all the formally negotiable legal assets on one side of it. The question seemingly posed by the mainstream responses to the scoping consultation is therefore this: how far outside the category of such formal assets may tax authorities go in order to bring residual profits back onshore?

A bold answer to this question was suggested by Nera Economic Consulting, which numbers Pim Fris, leading transfer pricing practitioner and author (and former head of Ernst & Young's European transfer pricing network), among its personnel.[87] Fris's submission gives to these exotic value drivers the label "intellectual capital". He argues that "[intellectual capital] is not being seriously considered in the [2010 guidelines] despite the fact that it is in many cases at the heart of the value creation process of MNEs."

Fris's observation is clearly somewhat at odds with the main thrust of the responses as characterized above. It welcomes exotic value drivers into transfer pricing, on the basis that they "create" (rather than merely "drive") value. He then performs a move which will, as we shall see, be in part (or at least superficially) replicated by the OECD. He writes:

> The proper starting point is in the relationship between the transacting parties, in the role of intangibles in the value creation, and in the roles and responsibilities allocated to the parties involved in *value creation* according to the business model defined for the enterprise. Only then do we have the ability to identify how this behavior would translate on the open market, i.e., between parties without shareholder relations per se but otherwise engaged under similar commercial and financial relations. [Emphasis added.]

The focus in transfer pricing has historically been on the roles and responsibilities of the entities participating in the transaction at hand,[88] whereas here we are to understand that

84. TEI, *supra* n. 81.
85. Id.
86. Id.
87. Nera Economic Consulting, *OECD Invites Comments on the Scoping of its Future Project on the Transfer Pricing Aspects of Intangibles* (OECD 2010), available at https://web.archive.org/web/20181202064906/http://www.oecd.org/tax/transfer-pricing/46019897.pdf.
88. *See supra* n. 60.

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there exists a totality of roles and responsibilities attributable around the group, all of which taken together account for the entirety of the group's profitability, and it is on that basis that profitability may be allocated between entities. In this "value creation" analysis, in contrast to the developments sought by the preponderance of other respondents, there continues to be no theoretical possibility of residual profitability. He refers to this approach as the "total value chain" approach, but of course it is not the totality of the value chain; it is only the part of value chain that arises within the MNE. With his move of theorizing the problem faced within transfer pricing without acknowledging the existence of residual profit within MNEs, he erases the remainder of the global value chain from which such residual profit is arguably captured. (Unnamed but probably lurking behind this move, which will be considered further in sections 3.3.2. and 4.2.2., is the "value chain" model promulgated by management guru Michael Porter.)

3.2.2. The 2012 discussion draft: Introducing the "bourgeois labour theory of value"

A discussion draft of revised intangibles guidelines followed in June 2012,[89] and by the third paragraph it had seemingly endorsed the Fris approach, or at least adopted its language: "in cases involving the use or transfer of intangibles", it announced, "it is especially important to ground the analysis on an understanding of the MNE's global business and the manner in which intangibles are used by the MNE to add or *create value*" [emphasis added]. In the same vein, paragraph 11 provides as follows:

> In a transfer pricing analysis of a matter involving the use or transfer of intangibles, it is important to identify the relevant intangibles with some specificity. The functional analysis should identify the economically significant intangibles at issue, the manner in which they contribute to the creation of value in the transactions under review, and the manner in which they interact with other intangibles, with tangible assets and with business operations to create value.

The phrase "value creation" crops up again throughout the document, but the role it plays does not become clear without investigating the response the document offers (despite the apparent adoption of the so-called "total value chain" approach) to the call for a boundary to be drawn between intangibles for transfer pricing purposes and what we have come to refer to as exotic value drivers. This is to be found in paragraphs 23 and 24.

In paragraph 23, the discussion draft articulates the boundary under the familiar label of "group synergies", which "can take many different forms including streamlined management, elimination of costly duplication of effort, integrated systems, purchasing power, etc". In paragraph 24, the draft articulates the boundary under the heading "market specific characteristics" and by way of example of these it offers that "the high purchasing power of households in a particular market may affect the prices paid for certain luxury consumer goods. Similarly, low prevailing labour costs [...] may affect the prices paid for specific goods and services in a particular market." The draft provides that neither synergies nor market specific characteristics are intangible assets for its purposes, and the distinction the discussion draft offers is that, unlike intangible assets proper, these exotic value drivers are (according to paragraph 23) "not owned or controlled by a single enterprise" or (as paragraph 24 puts it) may not "be owned, controlled and transferred by a single enterprise".

89. OECD, *Revision of The Special Considerations for Intangibles in Chapter VI of the OECD Transfer Pricing Guidelines and Related Provisions* (OECD 2012), available at https://web.archive.org/web/20190116094939/http://www.oecd.org/tax/transfer-pricing/50526258.pdf.

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It does not appear that much turns on the differences of drafting between the two paragraphs, since the point appears to be the simple one that no individual entity in the group is capable of treating the exotic value driver as an asset held specifically by it as against other members of the group. In other words, this proposed boundary between intangible assets and exotic value drivers reflects the fundamental flaw in the separate entity approach that has been there all along – the fact that the group is, from the point of view of profitability, more than the sum of its parts. It constitutes a fresh articulation of it, however, and one that is proposed to be formally embedded in transfer pricing norms.

The way that these synergies and market-specific characteristics should figure in the transfer pricing process, according to the draft guidelines, is not as intangible assets but as "comparability factors". Paragraph 23 proposes this with regard to synergies without further elaboration, but market-specific characteristics are said in paragraph 24 to amount to comparability factors with a notable reference to paragraphs 9.148-153 of the 2010 guidelines.

Those paragraphs offer two contrasting examples of procuring inputs from a sibling entity in a low-labour-cost jurisdiction. In one instance, the input is a manufactured item, where the market for such production is competitive, and in another instance, the input is a specialized service where the sibling "has developed a valuable intangible corresponding to its technical knowhow". We therefore have an example on the productive, and an example on the unproductive, side of the classical production boundary discussed in section 2 of this article. In neither case is an exotic value driver analysed as an asset, but the enhanced margins referable to the exotic value driver are analysed differently in each case nonetheless. In the case of the manufactured item, an ordinary comparison with a (competitive and therefore low) uncontrolled price is indicated, with the consequence that the residual profitability lies where it falls (i.e. potentially, offshore). In the case of the valuable service, by contrast, a certain amount of the residual profitability may be reallocated to the onshore jurisdiction where the work is done, under the profit split method, on the basis that the unique technical know-how underpinning the service means that comparability with the market is not available.

The implication of drawing particular attention to these paragraphs appears to be that, notwithstanding the generality of the role of comparability factors, exotic value drivers *when encountered in combination with certain kinds of labour* tend to impose a requirement to adopt the profit split method (the consequences of that method being that greater amounts of profitability will be allocated onshore). This inference is reinforced in paragraph 128 of the draft, which provides that the profit split method is the method best suited to situations "where both parties to the transaction make unique and valuable contributions to the transaction".

Returning now to "value creation", as already noted it is adverted to throughout the document, but there are two paragraphs that particularly help in clarifying the role the concept plays; paragraphs 108 and (to a lesser extent) 68. Paragraph 68 is concerned with the specific situation in which an intangible asset is itself the subject of an intra-group transaction, and it discusses the residual profitability problem as manifest in those particular circumstances, explaining that individual intangible assets held by individual entities can add up to a greater value than the sum of their individual values. The example given in the paragraph is of a pharmaceutical patent, a pharmaceutical brand and pharmaceutical regulatory approval, all applicable to the same drug, but in the hands of three different members of a pharmaceu-

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ticals group. The point the paragraph makes is simply that the values of these assets for the purposes of intra-group transactions must be the value they have in combination with the other group assets. So, for example, if one of the assets is being allocated to a low-tax jurisdiction with a view to allocating residual profitability to it, it would not be in accordance with these draft guidelines to perform that transfer at a low value.

The point is made in terms of asset values throughout the paragraph, but it ends with the following sentence: "It is important to consider the relative contribution to the *value creation* where different associated enterprises hold rights in the intangibles used" (emphasis added). It is not clear what the concept of value creation adds to the point being made in the paragraph, but it establishes a connection between value creation and residual profitability; that the valuing of assets and carving up of residual profitability has to be performed on a basis that is sensitive (and, implicitly at least, consistently so) to the realities of the role assets play in profitability. It is, in other words, an articulation of the total value chain approach. But, as already noted, the discussion draft only pays lip service to the total value chain approach, excluding exotic value drivers from the definition of intangible assets. What, then, of the situations where residual profitability is not capable of being associated with any recognized intangible asset; i.e. the more general version of the specific circumstance envisioned in paragraph 68. The answer emerges in paragraph 108:

> In matters involving the use or transfer of intangibles, caution should be exercised in adopting a transfer pricing methodology that too readily assumes that all residual profit from transactions after routine functional returns should necessarily be allocated to the party entitled to intangible related returns. The selection of the most appropriate transfer pricing method should be based on a functional analysis that provides a clear understanding of the MNE's global business processes and how intangibles interact with other functions, assets and risks that comprise the global business. The functional analysis should identify other factors that contribute to value creation, which may include risks borne, specific market characteristics, location, business strategies, and MNE group synergies among others. The transfer pricing method selected, and any adjustments incorporated in that method based on the comparability analysis, should appropriately reflect all of the relevant factors materially contributing to the creation of value, not merely reflect intangibles and routine functions.

In the context of paragraphs 23, 24 and 128, it is clear what is being proposed here. The profitability of the group as a whole should be analysed, and residual profitability should not necessarily be allocated to formal intangible assets (presumptively held offshore in accordance with the kinds of structures described by Collier and Andrus above). Instead, it may be attributed to exotic value drivers, potentially increasing the amount of profitability to be allocated *onshore*. This allocation would take place either by means of a comparability adjustment or (in cases where the exotic value driver is so dominant that a comparability adjustment would not be possible) through a normative preference for the profit split method. "Value creation" seems to indicate the basis on which to determine that an onshore entity is entitled to such an allocation, and as we have seen, this entitlement arises in respect of certain categories of labour.

In referencing the distinction between the categories of labour discussed in paragraphs 9.148-153 of the 2010 guidelines, the OECD is seemingly proposing that exotic value drivers can only yield a reallocation of residual profitability in a case where the exotic value driver can be associated with intellectual content of (as opposed to the material performance of) a labour process – the "alchemy" must be understood as lying in human brains. As discussed in section 2., from the perspective of mainstream Marxist political economy and its offshoot

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the monopoly capitalism school, which is that intellectual content can only be unproductive labour, it does not create value. Recalling that residual profitability includes the proceeds of value capture, a norm therefore appears to be emerging whereby “unproductive” labour within the MNE can exert a gravitational pull over the portion of the global corporate tax base structurally associated with value capture. Provisionally, it would appear that that is what “value creation” in this context means: unproductive labour associated with value capture. This is what (recalling the introduction to this article) Greenberg refers to as the “bourgeois labour theory of value”.

It should be noted that the profit split method associated with exotic value drivers as comparability factors does not yield a full reallocation of residual profitability from one entity to another, as exotic value drivers would if they were characterized as assets in accordance with some of the more aggressive tax authority positioning complained of in response to the scoping exercise. The profit split method yields, rather, a basis for carving up the allocation *between* entities. What is being proposed in this discussion draft, therefore, is a compromise basis on which states can make a claim to a share in at least some of the proceeds of value capture, and “value creation” (i.e. unproductive labour associated with value capture) is being offered as the euphemistically labelled conceptual space in which that negotiation can take place. To be clear, this is not a proposal for states to share in the proceeds of value capture by taxing them; it is a proposal for states to share in *some* of the proceeds by taxing *some* of them. The offshore space in which the residual profits of MNEs arise is being deliberately kept open by this proposal. What is up for grabs is the size of capital’s tax-free portion. This outcome may be thought of as being determined by the issue of causal versus quantitative relations. There is only so far a *causal* relation can plausibly be understood to be *quantitatively* implicated in a giant pool of profits.

3.2.3. Responses to the discussion draft: “Value creation” as a site of compromise

The discussion draft yielded a huge response, which is available as a single thousand-page PDF on the OECD website.[90] A key feature of the responses is that the identification of “synergies” with comparability factors rather than intangibles is widely welcomed, with the welcome generally qualified by a call for further clarity.[91] At the same time, a note of caution is sounded by some as regards ways in which the approach might go too far,[92] while a few respondents seem more alarmed by the possibilities.[93]

Only one respondent, Richter Consulting, sought simply to defend the status quo, with the following observation, seeking to characterize the phenomenon of residual profitability

90. OECD, *The Comments Received with Respect to The Discussion Draft Revision of The Special Considerations for Intangibles in Chapter VI of The OECD Transfer Pricing Guidelines and Related Provisions* (OECD 2012), available at https://web.archive.org/web/20141120102431/http://www.oecd.org/ctp/transfer-pricing/Intangibles_Comments.pdf.

91. *See* id., for example, for the responses of the Federation of German Industries at p. 126, BIAC at p. 163, BusinessEurope at p. 244, the Confederation of British Industry at p. 260, CMS Bureau Francis Lefebvre at p. 313, Fédération des Experts comptables Européens at p. 436, Freshfields Bruckhaus Deringer at p. 452, Grant Thornton at p. 457, Japan Foreign Trade Council at pp. 492-493, the National Foreign Trade Council at p. 589, PwC at p. 611 and pp. 622-623, RSM International at p. 645, Salans at p. 650, the Transfer Pricing Discussion Group (a multi-sector MNE association) at p. 849, Unites States Council for International Business at p. 695, and VNO-NCW (a Dutch employers’ federation) at p. 987.

92. *See* id, at p. 920, for example, for the Treaty Policy Working Group (another multi-sector MNE association, represented by Baker & Mackenzie) response.

93. *See* id., at p. 427, for example, for the Ernst and Young response.

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arising offshore as the “natural result” (and therefore, inferentially, the normatively desirable result) of the operation of the system:

> Also included in the category of undefined intangibles are those that the Discussion Draft identifies as “group synergies”. Although these are intangible assets, we believe these should be ignored for transfer pricing purposes because by definition, the arm’s length principle asks us to price transactions as if parties are dealing at arm’s length and therefore, the effect on pricing from factors such as group synergies in a controlled transaction should be ignored. Under this premise, the natural result is one where returns associated with group synergy intangible assets, if any, accrue to the non-tested party in a controlled transaction.[94]

At the other end of the spectrum, only one respondent seemed to think that the approach taken in the discussion draft did not go far enough: Pim Fris, who again submitted that all intangibles, including exotic value drivers, should be treated in the same way, in pursuance of the total value chain approach. Mindful of the sheer scale of the problem this discussion draft’s approach only goes some way towards solving, he notes that

> It can reasonably be defended that the approach of the Discussion Draft, and the current one of Chapters I-III, can very adequately serve as effective guidance for the large majority of inter-company transactions. Point is however that a (relatively small) number of transactions is not covered, while precisely these transactions usually connect with considerable entitlements to future profits.[95]

What is noticeable among this spectrum of reactions, however, and in particular in connection with the broad welcome received by the idea of treating exotic value drivers as comparability factors, is that the core structural problem of residual profit is no longer at the forefront of the responses. A couple of respondents (namely Ernst & Young and PwC) continue to use the term “economic rent” in passing, but the surprisingly frank and widespread engagement with the practical manifestations of monopoly power that characterized the responses to the scoping exercise is absent. The overall impression therefore, notwithstanding the concerns expressed over the detail (and the outliers who reject the proffered solution altogether), is one of crisis averted. The core structural problem of the arm’s length principle – that multinational corporations make more profit than the profit that their individual component entities would make; so much more in fact that it was threatening to delegitimize the entire system – is returned to respectable obscurity beneath a layer of transfer pricing technicality seeking to effect a fresh compromise between capital and the state.

In tandem with this development, the “value creation” language is largely adopted unchallenged in the responses, or even – as this example from KPMG’s response illustrates – expressly approved:

> KPMG also agrees with several other statements in the Discussion Draft. Another example is the following statement on the importance of understanding the MNE’s global business: “Indeed, in cases involving the use or transfer of intangibles, it is especially important to ground the analysis on an understanding of the MNE’s global business and the manner in which intangibles are used by the MNE to add or create value”.[96]

Deloitte go so far as to suggest that the discussion draft’s adoption of the value creation concept is nothing more than a *reminder* of existing learning:

94. Id., at p. 637 (Richter consulting response).
95. Id., at p. 597 (NERA Consulting response).
96. Id., at p. 515 (KPMG response); for instances of more neutral adoption of the language, *see* id., at p. 56 (Baker & McKenzie response), p. 317 (CMS response) and p. 940 (TPWG response).

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> Paragraph 130 reminds us of the issues to be taken into account when applying a profit split method in a case involving the use of intangibles, which includes (i) the identification of the intangibles in question, (ii) the evaluation of the contribution of these intangible to the creation of value, and (iii) the evaluation of other income-producing functions, risks, and assets.[97]

Barely any respondents treat the meaning of the phrase as anything other than self-evident. It is possible to discern in PwC's response a wry acknowledgement that the concept serves a euphemistic function,[98] but they certainly do not reject it. The only outright rejection comes from Grant Thornton, who object to the final sentence of paragraph 108 of the discussion draft which, as observed above, serves to tie the discussion of transfer pricing method selection where there are intangibles to the more general thrust of the document:

> The meaning of the word "securing" appears unclear, as is the meaning of the term "value creation". We find the last sentence confusing, and suggest it may not be needed.[99]

The sentence does indeed appear otiose in its immediate context. Grant Thornton are here refusing to read between the lines, and what is remarkable is that they were the only respondent to do so. The overwhelming majority of respondents accede to it without comment or with greater or lesser degrees of express enthusiasm. The "value creation" gloss on the OECD's compromise solution to the problem of value *capture* seems to have embedded itself almost imperceptibly.

Three respondents to the discussion draft, including KPMG & PwC, characterize the overall effect of the proposed developments in a way that somewhat anticipates the role the "value creation" element plays in the formally structured BEPS process. They note that the effect of the proposal is to bring the system closer to one based on "formulary apportionment".[100] As USCIB puts it:

> We believe the current draft will devolve in some cases to a de facto formulary apportionment where one country argues for a share of synergistic values based on allocation of the intangibles it has created in whole or part if a new standard is created that does not rely on legal ownership and the risks borne by the legal owner.[101]

These concerns appear to be very much in the nature of the concerns noted above about the proposed compromise being taken too far by tax authorities. The correct resolution to the problem of residual profits accruing offshore for these respondents was for a space to be developed where some profitability, but definitely not all, was to be brought onshore. And it is in the context of this developing settlement over the problem of residual profits

97. Id., at p. 376 (Deloitte response).
98. Id., at p. 611 (PwC response): "We however, wish to note that while paragraph 13 indicates that the OECD has chosen not to rely on the distinction between "routine" and "non-routine" intangibles, we assume that this does not constitute a rejection of the rationale for the distinction between "routine" and "non-routine" intangibles, since the Discussion Draft encourages the identification of "economically significant intangibles" as well as the manner in which intangibles "contribute to the creation of value" (paragraph 11). Otherwise, it would be difficult to practically assess what constitute "economically significant intangibles" or which intangibles create value. If this is not how the OECD interprets such paragraph, we would like the OECD to consider providing some guidance as to how one could objectively assess if an intangible indeed meets the definition of being "economically significant"?"
99. Id., at p. 459 (Grant Thornton response).
100. *See* S. Picciotto, ed., *Taxing Multinational Enterprises as Unitary Firms* (Institute of Development Studies 2007) for an overview of this topic.
101. OECD, *supra* n. 90, at p. 967 (USCIB response); *see also* KPMG response at p. 516 and PwC response at p. 623.

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– a halfway measure between the existing regime and formulary apportionment – that the subsequent deployment of the concept of "value creation" may be understood.

3.3. "Value creation", transfer pricing and BEPS

3.3.1. "Value creation" introduced as an overall guiding principle in the BEPS process

It is worth recalling that this process of advancing and refining what "value creation" means in the context of transfer pricing took place before the BEPS process even began. It was in February 2013 that the initial BEPS study was published.[102] It did not mention "value creation" at all, although it did advert to the issue of intangibles as a key area of concern and flag up that the existing work on intangibles was anticipated to "provide immediate responses to some of the most critical profit shifting challenges".[103] The language here is notable – the OECD began the BEPS process seemingly confident that (a) it already knew what one of its centrepiece solutions was going to be, and (b) that that solution was to be found in this arena of intangibles that we have been investigating in this section.

The BEPS Action Plan was published a few months later in July 2013, and value creation is a prominent concept in the document. It did not, at this stage, quite go so far as to place the value creation concept front and centre in respect of the entire thrust of the project – that came a few weeks later with the G20's Saint Petersburg declaration of September 2013: "We welcome the establishment of the G20/OECD BEPS project and we encourage all interested countries to participate. Profits should be taxed where economic activities deriving the profits are performed and where value is created".[104] This centrality of the value creation concept then fed into subsequent OECD materials – for example the project's explanatory statement,[105] and its FAQ.[106] None of these documents made any attempt to explain – not even obliquely – what was meant by the term "value creation".

The role played by the concept of value creation in the BEPS Action Plan is more intricate than the subsequent broad statements of principle that seem to derive from it. One of the ways in which it is used is to refer back to the BEPS study in such a way as to suggest an existing genealogy for the concept where no such genealogy exists. It makes the following claim:

> The BEPS report notes that there are several studies and data indicating that there is an increased disconnect between the location where value creating activities and investment take place and the location where profits are reported for tax purposes.[107]

What was noted in the preceding study was in fact this:

> There are a number of studies and data indicating that there is increased segregation between the location where actual business activities and investment take place and the location where

102. OECD, *OECD Urges Stronger International Co-operation on Corporate Tax* (OECD 2013), available at https://web.archive.org/web/20170417150453/http://www.oecd.org/tax/oecd-urges-stronger-international-co-operation-on-corporate-tax.htm.
103. *OECD BEPS Action Plan*, *supra* n. 2, at p. 49.
104. G20 Leaders' Declaration (2013), available at https://web.archive.org/web/20190127145718/http://www.g20.utoronto.ca/2013/Saint_Petersburg_Declaration_ENG.pdf.
105. OECD, *First Recommendations for a Co-ordinated International Approach to Combat Tax Avoidance by Multinational Enterprises* (OECD 2014), available at https://web.archive.org/web/20170417154825/http://www.oecd.org/ctp/beps-2014-deliverables.htm.
106. OECD, *Top Ten FAQ About BEPS* (OECD 2015), available at https://web.archive.org/web/20170417154954/http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm.
107. *OECD BEPS Action Plan*, *supra* n. 2, at p. 21.

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> profits are reported for tax purposes. Actual business activities are generally identified through elements such as sales, workforce, payroll, and fixed assets.[108]

Prima facie, then, "value creation" means the same as "actual business activities", which means the kinds of identifiable factors of apparent production and indicia of apparent realization ("sales, workforce, payroll, and fixed assets") that might end up in an apportionment formula under a formulary apportionment system. That is not the whole story, however; the paragraph goes on to elaborate as follows:

> Studies that have analysed aggregated data on global investment positions between countries show that this segregation is indeed taking place, with in particular profits from mobile activities being increasingly shifted to where they benefit from a favourable tax treatment. However, because the underlying accounting data may not reflect some of the most important assets, namely mobile assets, these studies cannot be regarded as providing more than circumstantial evidence of the existence of BEPS.

Those important mobile assets are, of course, intangibles. And so, value creation in this context appears to mean actual business activities such as would allocate the tax base to an onshore jurisdiction under formulary apportionment, subject to the complicating factor of intangibles which may, *to some indeterminate extent* (albeit not wholly, since that would militate against any action at all), legitimize the continued allocation of corporate profitability offshore. This is of course completely consistent with the idea that emerges from the 2012 discussion draft of value creation as a kind of gravitational pull exerted on offshore residual profits, not bringing them onshore altogether, but bringing them onshore to a certain extent.

This positioning of the idea of value creation as a kind of compromise between allocating residual profitability to intangible assets held offshore and eradicating it altogether by means of formulary apportionment is almost set out in terms in this paragraph in the Action Plan:

> In the area of transfer pricing, the rules should be improved in order to put more emphasis on value creation in highly integrated groups, tackling the use of intangibles, risks, capital and other high-risk transactions to shift profits. At the same time, there is consensus among governments that moving to a system of formulary apportionment of profits is not a viable way forward[.][109]

The key point here is that the adoption of value creation as a guiding principle for transfer pricing reform goes hand in hand with a rejection of formulary apportionment. The role of the "value creation" concept – made possible by the ambiguity between a causal and a quantitative relation between apparent profit drivers and the resulting profits – is neither to protect nor eradicate the phenomenon of residual profitability arising offshore, but to open up a space in which capital and the state can bargain over it as it arises.

3.3.2. The metastasization of "value creation"

The focus here is on mapping the detailed terrain of meaning of the phrase "value creation" from pre-BEPS materials relating to the transfer pricing of intangibles. Once the phrase was adopted as a guiding principle for the BEPS Project more generally, it rapidly assumed the

108. OECD, *Addressing Base Erosion and Profit Shifting* p. 20 (OECD 2013), available at https://www.oecd.org/ctp/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm.
109. *OECD BEPS Action Plan*, *supra* n. 2, at p. 14.

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vaguer meaning identified in the introduction to this article – its largely question-begging and wholly anodyne deployment as a broad reference to activities which could be said to give rise to profitability. As used in that sense, its most readily appreciable manifestation may be in the use made by tax professionals of the "value chain analysis" concept, already encountered in this section in the form of Pim Fris's submissions to the intangibles consultation set out in section 3.2.

"Value chain analysis" is to be contrasted with the concept of the global value chain, insofar as global value chains are by their very nature agnostic as to whether a node is within or outside a lead firm, from the point of view of its participation in the chain. The "value chain analysis" concept, by contrast, is about identifying the activities *within* a firm that play a role in its "competitive advantage" over other firms.[110] It therefore embeds the assumption that all profitability in a firm is a manifestation of value creation within a firm rather than value captured from outside. Its principal role in transfer pricing today (i.e. following BEPS) is a defensive one on the part of firms, in the context of the vastly more exigent reporting requirements imposed pursuant to Action 13 of BEPS (Transfer Pricing Documentation and Country-by-Country Reporting).[111] The enhanced data available to tax authorities with regard to the activities and tax affairs of the firm as a whole has the consequence that transfer pricing outcomes will need to be justified in the context of that data, and it is by means of "value chain analysis" that tax professionals propose to navigate those risks.[112]

It may be noted that the OECD did not itself deploy the "value chain analysis" concept in the original BEPS Project but it did briefly flirt with it in post-BEPS work on the profit split method,[113] much to the dismay of consultation respondents representing the interests of corporate capital.[114] Broadly speaking, their objection was that, notwithstanding their use of the concept as a shield on the part of firms as described above, the concept should not be deployed as a sword by tax authorities, i.e. as a back-door route for establishing unitary taxation by formulary apportionment. It did not survive into the subsequent discussion draft.[115]

In any event, notwithstanding the metastasization of the value creation concept as thus sketched out, it is nonetheless possible to trace into the BEPS Project the more focused themes that have emerged in this section, albeit that it is in these pre-BEPS materials that

110. M.E. Porter, *Competitive Advantage* (The Free Press 1985).
111. *See* OECD, *Transfer Pricing Documentation and Country-by-Country Reporting: Action 13 Final Report*, (OECD 2015), available at https://web.archive.org/web/20200226153336/https://www.oecd-ilibrary.org/docserver/9789264241480-en.pdf?expires=1582732092&id=id&accname=guest&checksum=33F25964EB3895439B36362D2BB1B09B.
112. *See*, by way of illustration, P. Daly & M. Joy, *Value Chain Analysis*, [2017] Tax Journal 1353, pp. 18-19 (2017).
113. OECD, *Public discussion draft: BEPS Action 8-10: revised guidance on profit splits* (OECD 2016), available at https://web.archive.org/web/20160803114714/http://www.oecd.org/tax/transfer-pricing/BEPS-discussion-draft-on-the-revised-guidance-on-profit-splits.pdf.
114. *See* OECD, *Comments Received on Public Discussion Draft: BEPS Action 8-10, Revised Guidance on Profit Splits* parts I and II (OECD 2016), available at https://web.archive.org/web/20190219014138/http://www.oecd.org/ctp/transfer-pricing/Comments-on-discussion-draft-beps-action-8-10-revised-guidance-on-profit-splitsP1.pdf and https://web.archive.org/web/20200226155145/http://www.oecd.org/ctp/transfer-pricing/Comments-on-discussion-draft-beps-action-8-10-revised-guidance-on-profit-splitsP2.pdf.
115. OECD, *Public Discussion Draft: BEPS Action 10: Revised Guidance on Profit Splits* (OECD 2017), available at https://web.archive.org/web/20170722071033/http://www.oecd.org/ctp/transfer-pricing/Revised-guidance-on-profit-splits-2017.pdf.

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they are to be observed most clearly; in the BEPS Project proper the apparent strategy of using the unproductive labour implicated in MNE value capture as a way to apportion the tax base between the state and offshore is only imperfectly realized under a number of specific heads. Perhaps most notably, there is the BEPS resolution to the problem of risk.

3.3.3. Risk: An illustration of the problem of causal vs quantitative relations

Much as in the case of formal intangible ownership, risk can easily be allocated offshore, such that the rewards which accrue to the taking of risk by the group can be made to accrue untaxed. These allocations are necessarily only meaningful on a formal level; as a matter of practical reality the risks of the group's business are borne by those with a financial interest in it – its shareholders and creditors – and (as already noted) the core norms at play here do not allow for allocation of the tax base to them. The OECD's solution to this problem is, in summary, to pay close attention to where the risk is "controlled", with control defined by reference to decision-making capacity.[116]

The simple illustration of a loan, as discussed in section 3.1.2., may be recalled. In that illustration the source of the interest was the capital advanced and so the question of where the underlying value comes from precedes the labour of those negotiating the loan. Equally, in the case of corporate risk, profits arising by reference to capital placed at risk can only be *causally* linked to risk-management labour; this labour is unproductive and cannot "create" value. It nonetheless exerts a gravitational pull on the international corporate tax base pursuant to the BEPS outputs. It may be noted that the scheme developed in the pre-BEPS materials whereby (as elaborated above) a gravitational pull of this nature creates a space in which capital and the state can bargain over the tax base is imperfectly realized in this instance, because it is a threshold test. An entity either performs enough "control" to be treated as the risk-bearer, or it does not.[117]

Indirectly, however, this approach to the allocation of risk provides the conceptual framework for a number of features of the BEPS transfer pricing outcomes where profitability can be partially allocated away from the entity to which it accrues by virtue of control otherwise than through that entity. Cost contribution arrangements are one example;[118] another example is one we are already familiar with – the profitability accruing in respect of intangible assets.[119] It is illustrative of the quantitative disconnect between even well-remunerated unproductive labour and the volume of profitability it is said to "create" that the deployment of this "control" concept for these purposes provides a fresh opportunity for abuse. As Collier and Andrus explain:

> If sufficient risk control related functionality is moved to a low-tax environment, using risk allocations to shift profits to that low-tax jurisdiction will still be possible. The control requirement may, therefore, not present a serious obstacle to those intent on shifting income on the basis of risk allocation. Indeed, it may create incentives to move certain types of employees to tax advantaged locations to shore up the claim that income should be allocated to such locations. Home jurisdictions to MNEs may thus lose both the income tax base and employment.

116. Collier & Andrus, *supra* n. 59, at 6.24-6.26.
117. Id., at 6.27.
118. Id., at 6.74.
119. Collier & Andrus, *supra* n. 59, at 6.64 and 7.55.

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3.4. The position as at 2015

In conclusion then, as regards transfer pricing, a crisis that appeared to have been developing was (at least temporarily) averted. The crisis was one whereby states were losing huge tranches of the tax base to offshore, and had been (seemingly contrary to principle) categorizing residual profit as arising from intangibles in order to claw back some of their losses. The OECD's solution was the concept of "value creation", which refers to (classically speaking) "unproductive" labour exerting a kind of gravitational pull over a portion of the global corporate tax base that constitutes "residual profits".

This is a portion which from the perspective of the "monopoly capitalism" school of classical political economy may be structurally associated with value *capture*. In other words, it is a portion that may represent value created outside the bounds of the firm altogether, and which therefore cannot necessarily be simultaneously allocated (a) to value creation in an objective sense, and (b) within the firm. Having in view the analysis in section 2., the allocation should most plausibly be upstream in global value chains to where material production takes place.

The debate between the OECD and the corporate sector seemed at first to acknowledge the role of monopoly power, but allocation outside the firm was apparently unthinkable at this stage, hence the (partial) attribution of the proceeds of capture to the labour associated with it. This partial approach (in contrast to formulary apportionment) offered to keep open the offshore space in which the residual profits of MNEs arise, albeit that it placed the size of capital's tax-free portion up for grabs. The compromise was made possible by the eliding of causal and quantitative relations between apparent profit drivers on the one hand and the resulting profits on the other: something having a merely causal relation can seemingly be implicated, but not necessarily *wholly* implicated.

The core structural problem of the arm's length principle – that multinational corporations make more profit than the profit that their individual component entities would make; so much more in fact that it was threatening, as noted at the outset of this article, to delegitimize the entire system – was thereby seemingly to be returned to respectable obscurity beneath a layer of transfer pricing technicality, effecting a fresh compromise between capital and the state. It did, however, leave in place a problem: what if the remainder of the residual profits are nonetheless on a scale big enough to continue to undermine the legitimacy of the system? This problem is most apparent in the digital sector – perhaps because (as foreseen by the postoperaists) it is in this sector that profitability is most glaringly quantitatively disproportionate to its causes – hence the post-BEPS project to address the taxation of that sector in particular, which is considered in section 4. which follows.

4. "Value Creation" and the Taxation of the "Digital Economy"

4.1. BEPS and the taxation of the digital economy

4.1.1. Postoperaists in Paris

The problem of untaxed corporate profits has for almost a decade been indelibly associated with the untaxed profits of certain specific MNEs, notable amongst which have been Apple, Google and Amazon. Accordingly, more-or-less from the outset of the BEPS process there was specific focus on a sector which (despite the diversity of products, services and business models included within it) is conveniently labelled the "digital economy". As the initial BEPS report explains:

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> current international tax standards may not have kept pace with changes in global business practices, in particular in the area of intangibles and the development of the digital economy. For example, today it is possible to be heavily involved in the economic life of another country, *e.g.* by doing business with customers located in that country via the internet, without having a taxable presence there or in another country that levies tax on profits. In an era where non-resident taxpayers can derive substantial profits from transacting with customers located in another country, questions are being raised on whether the current rules are fit for purpose.[120]

It is already clear at the stage of the BEPS Action Plan (i.e. in July 2013) that something slightly different is going on with regard to this topic as compared to the scheme that we saw developing in the context of transfer pricing in section 3., where "value creation" was a composite concept that included value capture. In this context value *capture* starts off as a named phenomenon and is being treated as distinct from value creation. The Action Plan argues that the "digital economy is characterised by an unparalleled reliance on intangible assets, the massive use of data (notably personal data), the widespread adoption of multi-sided business models *capturing value* from externalities generated by free products, and the difficulty of determining the jurisdiction in which *value creation* occurs [emphasis added]".[121]

The "difficulty of determining the jurisdiction in which value creation occurs" is one we are familiar with from our exploration of the topic of transfer pricing. "Value capture", at this stage at least, appears to be a fairly narrowly circumscribed *additional* phenomenon that only takes place when you give away free products. To elaborate, the Action Plan seems to posit a distinct sphere in addition to the sphere where transactions in the nature of market transactions take place – a sphere where the mechanism of exchange is indirect: free products are supplied and value accrues from some other source than the consumers of the product. This might be, for example, (so the Action Plan implies) where Google provides web search or Facebook provides social networking for free but they sell advertising to businesses wishing to advertise to the websites' users.

On the face of it, it is hard to see how this really is a distinct sphere from the sphere of "value creation". If we suppose "value creation" to mean, broadly, substantive business activity of any kind, as is generally inferred (as to which, *see* the introduction to this article), then sales of advertising should just be value creation of that ordinary kind, irrespective of the specific advertising medium. Of course (as noted in section 2.) in the classical schema deploying the production boundary, *all* advertising spend is value capture (as opposed to value creation) on the part of the business receiving the spend, whether it be in the "digital economy" or in a printed magazine. But the OECD appears to be intimating that there is a mid-point between these two analyses, whereby advertising services create value in some circumstances but capture it in others.

A clue as to how, tentatively, the OECD may have been imagining the distinction to be drawn is to be found in a report published a few months earlier by a French-government-commissioned task force on this same topic. The report makes the following core claim (to quote from its executive summary):

> Data collection reveals the "free labour" phenomenon. Everything leaves a trail in the digital economy. Regular and systematic monitoring of their online activity means that data on application users are collected without any monetary consideration. Users become virtual volunteer

120. OECD, *supra* n. 108, at p. 7.
121. *OECD BEPS Action Plan*, *supra* n. 2, at p. 10.

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> workers for the companies providing the services that they use. The data from the users' "free labour" are collected, stored and processed to be integrated into the production chain in real time, blurring the dividing line between production and consumption. Users are attracted by the quality of interfaces and network effects. The data that they provide makes them production auxiliaries and they create value that gives rise to profits on different sides of the business models.[122]

The report makes extensive use of this "free labour" concept, offering policy recommendations off the back of it to do with tax systems recognizing it and capturing for tax purposes the value argued to arise from it. The distinction between profitability where "free labour" is implicated and ordinary profitability is drawn out in a passage referencing theory-of-the-firm literature:

> Companies are no longer restricted to a choice between sub-contracting to suppliers and hiring employees. In the digital economy, they have a third choice, which is to produce an application that inspires users to engage in an activity that generates positive externalities in the form of data, which are then put back into the production chain without any monetary consideration for the users. This "free labour" explains some of the low marginal operating costs and explains the exponential returns to scale that are specific to the digital economy.[123]

The difference then, expressed in terms of the contrast between advertising on a social media platform such as Facebook and advertising in a printed magazine, is that the magazine proprietor had to pay journalists, editors, designers, photographers and so on to make the magazine attractive to readers, whereas the attractions of Facebook *to* its users are generated *by* its users. By the same token, the argument in the context of Amazon would be that the costs being saved are the costs of determining which products are going to be attractive in which markets, how they should be priced and so on. The enhanced profitability of the "digital economy" sector is, on this analysis, a matter of cost reduction as opposed to being attributable to the origination of products and services to which "free labour" contributes.

The report makes the further claim that user data is "put back into the production chain in the digital economy, blurring the dividing line between production and consumption",[124] but no account is provided in the report of this mechanism whereby activities that save the firm costs become factors of production. Or, to put it more concretely, no explanation is given as to how the saving of costs as compared to traditional platforms translates into revenues that might well (and in practice often do) exceed traditional platforms. This is the fatal flaw at the heart of its "free labour" thesis. It is not the use of data in the "digital economy" that is blurring the dividing line between production and consumption, it seems; it is the authors of the report. They concede that there is nothing new about consumer participation playing a role in business models, but explain that "the digital revolution expanded this approach by taking it to a much larger scale and by extending it beyond advertising, marketing and the media into all dimensions of business".[125] Again, the distinction between the "digital economy" and its non-digital analogues is not satisfactorily theorized.

Despite these shortcomings, the report appears to have been influential on the authors of the BEPS Action Plan; the language about user activity generating positive externalities that

122. P. Collin & N. Colin, *Task Force on the Taxation of the Digital Economy Report* p. 2 (Collin & Colin 2013), available at https://web.archive.org/web/20151020171724/http://www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf.
123. Id., at p. 49.
124. Id.
125. Id., at p. 50.

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are then put back into the production chain without any monetary consideration seems to be reflected in the BEPS Action Plan language about business models capturing value from externalities generated by free products. And indeed, the authors of the report claim that their interactions with the BEPS team were "informal but frequent and in-depth, especially on the road to adopting the BEPS action plan".[126] (The fact that the OECD is based in Paris may have had something to do with the frequency of these interactions.)

A particularly fascinating aspect of the report for the purposes of the argument in this article is the list of antecedents to their analysis that the authors provide. There are a number of management authors and tech authors, but buried at the bottom of the list are authors writing in the Marxian tradition, including one that we have already met in our discussion of postoperaismo in section 2., Antonio Negri.[127] Here then is a just-discernible genealogical thread linking the BEPS process to an offshoot at least of the classical tradition. The questions being asked of the dynamics to which value is subject in the digital economy seem to have a root – or at least a tendril – in the postoperaist idea discussed in section 2. that unwaged immaterial labour in culture at large is implicated in the production of value.

From the perspective of international corporate tax reform, this is a profoundly radical position, because it potentially locates "value creation" (in other words, within the BEPS scheme, a phenomenon attracting an allocation of profits for tax purposes) in jurisdictions where no business activity of any kind takes place on the part of the MNE aside from giving away services for free. Realistically of course, for the most part one would expect sales (e.g. of advertising) to also be taking place in those jurisdictions, and so this approach may in practice not be such a departure from the idea of allocating a tranche of digital economy profitability to jurisdictions in which sales take place (also alluded to as a possible route to a solution in the initial salvo of BEPS documents[128]). Either way, however, it is being suggested that "value creation" is taking place at the point of consumption rather than within the firm, which is wholly at odds with the axiom we encountered in section 3., whereby profitability has to be kept within the firm for tax purposes even if it may have been captured from elsewhere in the global value chain.

The difference here of course is that the locus of "value creation" is not upstream in the value chain to sites of material production; it is downstream in the value chain towards the sphere of consumption. The reallocation of taxable profits being contemplated in this context would largely bolster fiscal resources in regions with high levels of consumption, rather than effecting a redistribution to less wealthy jurisdictions. And that is no doubt why reallocation outside the firm is in blithe and unabashed contemplation here while being

126. International Tax Review, *Pierre Collin and Nicolas Colin* (interview), International Tax Review (11 Dec. 2013), available at https://www.internationaltaxreview.com/article/b1fbsx5c9x2vs5/pierre-collin-and-nicolas-colin and https://archive.is/rsrX8.
127. Collin and Colin, *supra* n. 122, at fn. 240.
128. *See*, for example, *supra* n. 122, at fn. 120; it may be noted in this context that in 2005 the OECD had already considered and rejected a series of proposals to modify norms around the definition of what constitutes a "permanent establishment" for tax nexus purposes (in other words for the purposes of establishing a jurisdiction's right to tax an MNE that operates in a jurisdiction otherwise than through a resident company) in the specific context of an enquiry into whether tax norms were up to the task of handling the digital economy. *See* OECD, *Are the current treaty rules for taxing business profits appropriate for e-commerce?* (OECD 2005), available at https://web.archive.org/web/20141121195341/http://www.oecd.org/tax/treaties/35869032.pdf.

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unthinkable in other contexts. Broadly speaking, it is the story of the onward progress of this possibility that is traced in section 4.

From the more abstract perspective of the value-theoretical narrative unfolding in this article, it is a story about the extension of the self-contradictory idea that unproductive *labour* is "value creating" for the purposes of the allocation of the international corporate tax base (i.e. the idea elaborated in section 3.), into an even more glaringly self-contradictory idea whereby value absorption more generally (i.e. *consumption*) is "value creating" for those purposes. Either way, of course, the target of reallocation is as much outside the classical production boundary as the offshore spaces that profitability is to be allocated away *from*.

4.1.2. BEPS Action 1: Cosmetic marginalism

The initial phase of that story played out under the BEPS Action 1, its purpose being to "address the tax challenges of the digital economy" by "identify[ing] the main difficulties that the digital economy poses for the application of existing international rules and develop[ing] detailed options to address these difficulties".[129] The issues to be examined included "the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services". This form of "value creation" would appear to be the aforementioned "value capture", here subsumed within the broader "value creation" concept.

Action 1 began in earnest in October 2013 with a meeting of the topic's task force, followed in November 2013 with a "Request for Input Regarding Work on Tax Challenges of the Digital Economy".[130] A compilation of responses received was published in January 2014.[131] A core theme of the responses was resistance to the idea of a radical change in approach, notwithstanding the much-flagged "challenges" presented by the digital economy. The idea of value being created by consumers was widely rejected.

A typical response came from Baker & Mackenzie, who represent the interests of "an informal coalition of leading US and non-US software, information / content, social networking, and e-commerce companies that provide goods or services through digital and nondigital means". Their view was that "[l]abor, capital, and innovation drive value in enterprises that exploit the efficiencies of digital communications" and further that "[t]his is no different than for any other enterprise operating in a competitive market". The key difference between this sector and other sectors being that a "digital enterprise may have a greater part of its assets embodied in intellectual property as opposed to physical assets such as machinery or equipment. In these cases, the principal value-drivers will be those personnel who pursue those business innovations necessary to maintain a competitive advantage".[132]

It is not hard to speculate as to the driver behind responses such as these. The focus on intellectual property and associated unproductive labour, rather than consumers and their "free

129. *OECD BEPS Action Plan*, *supra* n. 2, at p. 14.
130. OECD, *Request for Input Regarding Work on Tax Challenges of the Digital Economy* (OECD 2013), available at https://web.archive.org/web/20140704021558/https://www.oecd.org/tax/request-for-input-regarding-work-on-tax-challenges-of-the-digital-economy.pdf.
131. OECD, *Compilation of Comments Received in Response to Request for Input on Tax Challenges of the Digital Economy* (OECD 2014), available at https://web.archive.org/web/20140124222710/https://www.oecd.org/ctp/comments-received-tax-challenges-digital-economy.pdf.
132. Id., at p. 40.

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labour", keeps the enhanced profitability of the digital economy subject to the offshore/onshore tug-of-war created by transfer pricing regimes as they apply to intellectual property assets (as to which, *see* section 3.). This is in contrast to locating it exclusively onshore in market jurisdictions to the fiscal detriment of MNEs.

A short while later, there followed a discussion draft[133] that began with a substantial overview of the role played by information technology in the global economy. The idea of users creating value through their free labour is still there, now characterized – by reference to generalized examples corresponding to Amazon and Facebook – specifically as a network effect, arising "from users' marginal utility to each other". "[T]he more users there are", the draft goes on to explain, "the higher the value created is".[134] There is of course no doubt that a network effect increases the utility of sites like Amazon and Facebook to their users, but what is interesting here (for a reading maximally attuned to value-theoretical nuances, at least) is that that increased utility is characterized as *creating value*, on the basis that the network effect increases specifically the *marginal* utility of users to each other.

Marginal utility is a concept from mainstream marginalist value theory – indeed it is one of the foundational concepts in that theory. It is the utility of the least important use to which a unit of a commodity would be put, that use being discovered by supposing the available quantity of that commodity to be reduced by one unit.[135] So, for example, if you own two hammers and use one for banging in nails and the other as a doorstop, but would use a single hammer (i.e. if you only owned one) for banging in nails, the utility of hammers, on the margin of their availability, to you, is that of a doorstop. The role of marginal utility as a concept is theoretical – it is the marginalist explanation for diamonds being worth more than water, even though they are less useful. It stands in opposition to the classical account, which would in simple terms be broadly to do with the disproportionate amount of labour that goes into obtaining diamonds as compared to the labour that goes into obtaining water. And so the suggestion here is that the value creation that takes place as between users is not, after all, referable to the "free labour" that they do, but is instead somehow a value creation process as theorized in mainstream economics, akin to the price-finding mechanism of the market as theorized in mainstream marginalism. Labour here is being implicitly repudiated as a source of value.

How specifically *marginal* utility is relevant here is not, however, explained. And an explanation would seem appropriate, since there is no price-finding as between users on these sites. The price finding on Amazon is between itself (and other vendors of commodities) and its users, and on Facebook it is as between Facebook and buyers of advertising. It is perfectly possible to come up with narratives as to how the role of other users enhances utility in these contexts, but it is by no means immediately obvious how the specifically *marginal* utility of users *to each other* should be relevant to a broad depiction of their role in a network effect. The inference therefore is that the deployment of the concept of marginal utility is more cosmetic than analytical, seeking to give the impression that there is no departure here from mainstream conceptions of how value is created (i.e. as discussed in the introduction to this article, at the intersection of marginal utility curves on the part

133. OECD, *Public Discussion Draft; BEPs Action 1: Address The Tax Challenges Of The Digital Economy* (OECD 2014), available at https://web.archive.org/web/20190118200320/https://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf.
134. Id., at p. 39.
135. *See* W. Smart, *An Introduction to the Theory of Value* ch. 5 (Ludwig von Mises Institute 1931).

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of market participants rather than in material production). Whereas of course this stuff is wildly heterodox, whether considered from a marginalist or a classical standpoint.

The more practical sections of the discussion draft do not, in any event, draw to any great extent on this theorizing. An extensive section discusses how other strands of the BEPS Project will address the challenges of the digital economy without the need for a specific focus on it, and (perhaps because "value creation" is presupposed as the guiding principle for those other strands) it is not framed by reference to "value creation" at all. The problem is referred to as "stateless income", and the solutions are grouped into (i) measures that will restore taxation in the market jurisdiction; (ii) measures that will restore taxation in both market and ultimate parent jurisdictions; and (iii) measures that will restore taxation in the jurisdiction of the ultimate parent. A following section on the problems specific to the digital economy that will remain despite these other strands does invoke the concept of "value creation", and again it is in the context of data: specifically "how to attribute value created from the generation of data through digital products and services".[136] The picture appears to be one whereby, in the case of the big digital economy players, the "bourgeois labour theory of value" as emerged for the purposes of transfer pricing reform (as to which, *see* section 3.) is not anticipated to make sufficient inroads into offshore profitability, and so a distinct additional class of "exotic value driver" – data – is required.

In section 3. we encountered a variety of euphemisms for market power, and it is worth noting that in this context the phenomenon of monopoly power is again being downplayed in the discussion – it gets a single paragraph's mention in the discussion draft and is then forgotten.[137] Seemingly, "value creation" by users in respect of data is the additional narrative fig leaf required to make that erasure. Monopoly power in the discussion draft is expressly associated with the network effect,[138] and the network effect is expressly associated with data,[139] but the link between data and monopoly power is not drawn. What we have here is a circumstance – disproportionate profitability in the digital economy, to which attention is being drawn because of its propensity to go untaxed – which cannot be explained by mainstream marginalism, but which is consistent with Marxian value theories. On the one hand, there is the monopoly capitalism take on traditional Marxism, which would analyse these profits as surplus value created in material production and accruing in the digital economy by virtue of value capture mechanisms associated one way or another with monopoly power.[140] And on the other hand there is postoperaismo, which would characterize this disproportionate profitability as being referable to immaterial unwaged value creation by consumers participating in society at large.[141]

Clearly, in view of its downplaying of the phenomenon of monopoly power, the OECD is not plumping for the former. It would appear, however, that the OECD was positively aligning itself to the latter. This may be discerned from the proposed policy interventions suggested

136. OECD, *Public Discussion Draft; BEPS Action 1: Address The Tax Challenges Of The Digital Economy*, p. 56 (OECD 2014), available at https://web.archive.org/web/20190118200320/https://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf.
137. Id., at p. 41.
138. Id.
139. Id., at p. 40.
140. *See* sec. 2.4.
141. *See* sec. 2.3.

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in the discussion draft,[142] which largely[143] relate to the tax law concept of "nexus". In principle, a state can legislate to tax whatever it likes, but in practice, and certainly in the case of corporate tax as levied in accordance with international norms, there must be a "nexus" within the jurisdiction giving rise to the liability to tax. That nexus is either a company resident or incorporated in the jurisdiction, or a "permanent establishment" (i.e. a branch), located in the jurisdiction, of a non-resident company. In essence the proposed interventions either (a) extend the concept of permanent establishment so as to make a permanent establishment more likely to arise in market jurisdictions in the case of digital economy companies, or (b) develop a wholly new nexus for the purpose of taxing digital economy companies in market jurisdictions. A further suggestion involved imposing a withholding tax on payments from market jurisdictions. In summary, then, the solution to the problem of "stateless income" in the case of the digital economy was to allocate the tax base downstream in global value chains towards consumption (i.e. to market jurisdictions), even in circumstances where to do so involves (in direct contrast to the constraints we saw applying in section 3. in relation to the issue of transfer pricing) piercing the boundary of the MNE and allocating the tax base to a jurisdiction where it does not have any kind of presence as conventionally understood.

As regards responses to the discussion draft,[144] there was a general consensus that the digital economy should (as the OECD had already asserted) not be ring-fenced for tax purposes but that (in contrast to the OECD's suggested approach of targeted measures) there was nothing really new about it. Many of the responses vigorously supported the points made by the OECD in respect of other BEPS measures being apt to tame the fiscal monster of the digital economy at least to a degree. None of the respondents engaged with the heterodox value theory in the discussion draft, except to the extent that (again) some respondents argued that, while clearly data is implicated in profitability, it is the work done to the data within the MNE that creates the value.[145] In contrast to the context of transfer pricing, where (as we saw in section 3.) the "bourgeois labour theory of value" was advanced by the rich states' club that is the OECD to effect a compromise with capital rather than having to adopt a more radical approach, here it is being advanced in the other direction by the representatives of capital as a bulwark *against* a more radical approach. Either way, however, whether it is capital's preference for the bourgeois labour theory of value in this context, or states' tentative interest in postoperaist excursions beyond the bounds of the firm, the target for reallocation is where the wealth is already concentrated, whether it be in the form of salaries or consumption levels. The idea of reallocation to where value is objectively created in accordance with the classical "production boundary" operated in mainstream marginalism and its offshoot the "monopoly capitalism" school has not been mooted. And this means (broadly, in view of the circumstances set out in section 2.5. with regard to the economic geography of the global value chains from which the value in the digital economy is captured) substantially constrained room for reallocation to less wealthy states.

142. Id., at pp. 64-67.
143. At least insofar as concerns what is relevant here, i.e. relating to direct tax; there are also proposals relating to indirect tax.
144. OECD, *Comments Received On Public Discussion Draft; BEPS Action 1: Address The Tax Challenges Of The Digital Economy* (OECD 2014), available at https://web.archive.org/web/20140513203829/http://www.oecd.org/ctp/comments-action-1-tax-challenges-digital-economy.pdf.
145. *See*, for example, the responses of BIAC and KPMG; id., at pp. 68 and 332.

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The content of the discussion draft went through two further iterations, as an interim deliverable in September 2014[146] and as a final BEPS output in October 2015,[147] but for present purposes the material evolved no further and no substantive reforms were recommended. The final report rather weakly suggested that states could unilaterally implement one or another of the solutions discussed "provided they respect existing treaty obligations", or implement them in bilateral treaties among each other.[148] The core problem of untaxed super-profits in the digital economy, the addressing of which was arguably the fundamental purpose of the BEPS process, remained unsolved. And the most overtly value-theoretical work stream – in a project driven by a purportedly value-theoretical guiding principle – had come to nothing.

4.2. "BEPS 2.0"

4.2.1. Responses to the request for input: Mercantilism or postoperaismo?

Following delivery of the BEPS package, there was an institutional shift whereby further policy developments were to take place under the auspices of the "Inclusive Framework", a mechanism for states that are not OECD members to collaborate with OECD members on the implementation of the BEPS reforms on a (formally at least) equal footing. In January 2017, the Inclusive Framework approved a renewed mandate for the task force that had produced the BEPS Action 1 output, and (with the blessing of the G20 and G7 expressed in subsequent months) the work began again – under the gathering clouds of what subsequently became a storm of unilateral measures intended to fill the gap left by BEPS Action 1 – with another request for public input, in September 2017.[149] In keeping with previous work in this area, the request for input invited respondents to discuss the role of digitalization in the "means and location of value creation", and flagged up the possibility that user participation and data gathering might have implications for how "value creation" is analysed for the purpose of that discussion. A draft outline of the report intended to follow the consultation[150] promised "analysis of heavily digitalised business models and their value chains to shed light on how and where value is created."

Responses to the request for input varied greatly in their willingness to accept that further reform was in the pipeline. On one end of the spectrum were those for whom the "value creation" concept, much though they may have deprecated it as an indeterminate novelty in other contexts, had seemingly (and most implausibly) become a hallowed principle of long standing that was threatened by this new process. "Consensus has been achieved",

146. OECD, *Addressing The Tax Challenges of The Digital Economy; Action 1: 2014 Deliverable* (OECD 2014), available at https://web.archive.org/web/20200221072733/https://www.oecd-ilibrary.org/docserver/9789264218789-en.pdf?expires=1582270945&id=id&accname=guest&checksum=5A201748CC8D3D43055F318848F7CD39.
147. OECD, *Addressing The Tax Challenges of The Digital Economy; Action 1: 2014 Final Report* (OECD 2015), available at https://web.archive.org/web/20200221072536/https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1582270570&id=id&accname=guest&checksum=F805B02514699310FD8803C735B6DD45.
148. Id., at p. 13.
149. OECD, *Request for Input on Work Regarding The Tax Challenges of The Digitalised Economy* (OECD 2017), available at https://web.archive.org/web/20171013091927/http://www.oecd.org/tax/tax-policy/tax-challenges-digital-economy-request-for-input.pdf.
150. OECD, *Outline of The Interim Report for The G20 Finance Ministers* (OECD 2017), available at https://web.archive.org/web/20171013095506/http://www.oecd.org/tax/beps/tax-challenges-digital-economy-draft-outline-2018-interim-report.pdf.

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announced KPMG by way of an argument against further reform,[151] "and is driving changes in corporate behavior to align around historic understandings of value creation and arm's length principles." "[S]ignificant time and effort was spent during the BEPS process determining where value is created and now", complained the OECD's own Business and Industry Advisory Committee with a markedly petulant tone, "it appears that those standards are considered by some to no longer be viable before we have seen their full implementation".[152] At the other end of the spectrum were voices like Ernst & Young's, who balefully recited the sheer number of unilateral measures already adopted or in the process of being adopted by states, and made it very clear that multilateral action would in their view be preferable.[153] Somewhere in between was PwC, whose counsel of extreme patience seems to have been offered in the hope that the promise of multilateral reform would be sufficient to stem the tide of unilateral measures, without actually delivering anything any time soon.[154]

Most of the respondents offered resolute resistance to the idea that value is created in markets, with some going so far as to posit value as an objective property of commodities which is conserved in exchange, broadly in accordance with the premises of classical value theory (as to which *see* section 2.1.). "We would continue to take the view that the profit attributable to a country where we make sales but have no physical presence is zero," explained publishing behemoth Informa in this vein, "as the value of an item is not changed by its mere sale".[155] "Innovation and production create value, consumption does not", explain the Digital Economy Group: a consortium of digital economy giants including Amazon, Expedia, Google, Facebook, Netflix, Microsoft, Spotify and Twitter (represented by Baker & McKenzie). "A commercial transaction between a supplier and a purchaser is an exchange of value for value (the good or the service is supplied in exchange for money or other consideration), but that transaction creates no new value".[156]

The proposition that value is created in consumption was offered in order to justify allocating the profits of digital economy giants onshore to market jurisdictions for tax purposes, and this counter-conception of value as an objective property of commodities which is conserved in exchange would in theory serve to protect them from that possibility, but of course in so doing it perpetuates the core BEPS problem: how to quantitatively allocate "value creation" to the various factors of production understood to imbue the commodity with value. It also, by way of a side-effect, constitutes a wholesale rejection of modern marginalist value theory. The "value creation" narrative, which was grudgingly adopted as a compromise solution to the problem of monopoly profits in a transfer pricing context, has blossomed into a full-blown assertion of the classical model of value. But it thereby revives the very problem classical value theory exists to solve (as to which *see* section 2.1.): if a "commercial transaction between a supplier and a purchaser is an exchange of value for value", then that must be true of all of a company's inputs, including labour. So where does

151. OECD, *Tax Challenges of Digitalisation, Comments Received on The Request for Input, Part II* p. 123 (OECD 2017), available at https://web.archive.org/web/20200225134834/http://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-2-comments-on-request-for-input-2017.pdf.
152. OECD, *Tax Challenges of Digitalisation, Comments Received on The Request for Input, Part I* p. 34 (OECD 2017), available at https://web.archive.org/web/20171031095200/http://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-1-comments-on-request-for-input-2017.pdf.
153. Id., at p. 165.
154. OECD, *supra* n. 151, at p. 194.
155. Id., at p. 33.
156. OECD, *supra* n. 152, at p. 138.

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profit come from? By positing that value is conserved in exchange but not addressing the paradox that premise gives rise to, these respondents are essentially taking (in response to the OECD's approach of postoperaismo turned marginalism-without-money) a pre-classical, mercantilist view of value.[157]

An alternative perspective is to be found among the respondents, however, who acknowledged the role of monopoly power. "[I]t is not appropriate extrapolating the situation of a few global digital giants owning digital platforms that are in a monopolistic / duopolistic situation, to the rest of market players," submitted a consortium of Spain-based lesser digital economy players.[158] Grant Thornton, an accounting firm responding to the consultation from outside the "Big Four" oligopoly within the business services market, and so no doubt reflecting the concerns of its client base also among lesser digital economy players, expressly drew the link between data, the network effect and monopoly power:

> The global economy has been increasingly impacted by the network effect, under which a business may use its data, derived from a critical mass of users, allowing it to develop a unique competitive advantage. By having a presence in a large market/country, software companies are now able to collect large quantities of raw data, which further enhances the opportunities for that business to further consolidate its market advantage and to be in a position to create even more valuable IP.[159]

Grant Thornton even goes so far as to accept in principle the logical conclusion of the existence of monopoly power that value may be created outside the firm, recognizing that there could be an argument that consumers create value downstream in the value chain in the form of data. They express doubts about the possibility that raw data as an input could be valued for these purposes, however, and (needless to say) there is no recognition of the possibility that the value may in fact be being created by productive workers *upstream* in the value chain in jurisdictions hosting material production.

Aside from the odd glimpse like this of an alternative view, however, in general the respondents representing the corporate sector seemed wholly unimpressed by the idea that user interaction with digital economy businesses is in and of itself value creating. It is against that background that the United Kingdom's intervention shortly afterwards seems particularly notable, as an epilogue to the request for input phase of the rebooted BEPS process. In November 2017, the United Kingdom published a position statement[160] that initially seemed to embed the new orthodoxy to the effect that, despite the contempt that it had attracted as a novelty earlier in the decade, the "value creation" principle had in fact been the principle underpinning international corporate tax norms all along.[161] It went on, however, to firmly adopt the analysis whereby data generated by users, at least insofar as concerns certain specific digital economy business models, should be treated as reflecting value creation, exhorting the OECD to consider the option of allocating profitability to jurisdictions based on some sort of user base metric.[162]

157. *Supra* n. 25.
158. Id., at p. 128.
159. Id., at p. 178.
160. HM Treasury, *Corporate Tax and The Digital Economy: Position Paper* (HMT 2017), available at https://web.archive.org/web/20181112092935/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661458/corporate_tax_and_the_digital_economy_position_paper.pdf.
161. Id., at p. 4.
162. Id., at p. 11.

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The United Kingdom government then published a follow-up paper taking into account views expressed to it in relation to the position statement.[163] One interesting evolution of the ideas previously expressed in the initial position paper was an answer to a question that might have arisen in respect of the claim that existing transfer pricing norms already identify where value is created, sitting alongside the novel claim that in some cases value is created by users, that question being to do with where within the firm this additional value is to be found. The answer offered by the United Kingdom is our old friend from the transfer pricing context (as to which *see* section 3.1.) the "residual profit".[164] In other words, if you assume that all the apparently productive activity within the firm takes place internally at competitive margins, the "user generated" value is an element of the additional profits earned by the outside-world-facing firm overall, in addition to those internal margins: additional profits that could equally be characterized as deriving from value capture referable to monopoly power.

The problem of the digital economy seems therefore to be the persistent (and, as we saw in section 3., deliberately only partially resolved) problem of what to do with excess profits referable to the monopoly power of MNEs. What the digital economy framing offers, whether it be via the idea of user-created value or otherwise, and whether it be by means of ring-fencing certain business models or otherwise, is a route to attributing the value creation outside the boundary of the firm (which on a mainstream Marxian or "monopoly capitalism" analysis is where it belongs) *without* attributing it to the low-paid workers who actually produce the stuff that, on a material level (and recalling the famous opening words of *Capital*), constitutes the wealth in our world.

4.2.2. The 2018 Interim Report and January 2019 policy note: A Porterian interlude

In accordance with the renewed mandate, the OECD delivered an interim report in March 2018.[165] The strategy the report adopts for navigating the theoretical indeterminacy of the space in which it is seeking to intervene is to attribute different theoretical positions to different groups of countries participating in the inclusive framework. It identifies three groups. There are those who adopt the position already adopted in its unilateral work on this issue by the United Kingdom; the position to the effect that user participation creates value. And there is a contrasting group that views the data that user participation gives rise to as a raw input that is *purchased* by digital economy firms pursuant to a barter-type transaction with users (i.e. in exchange for a free service). The third group (perhaps inferentially supportive of the status quo) adopts neither of these novel positions.[166] As regards the question of monopoly power, it lists a number of features of the digital economy which would tend to suggest that that is a key mechanism at play (network effects; lock-in and so on), but equivocates on drawing that conclusion, noting the "low marginal costs and non-rivalry of many digital goods".[167]

163. HM Treasury, *Corporate Tax and The Digital Economy: Position Paper Update* (HMT 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689240/corporate_tax_and_the_digital_economy_update_web.pdf.
164. Id., at p. 15.
165. OECD, *Tax Challenges Arising from Digitalisation –Interim Report 2018* (OECD 2018), available at https://web.archive.org/web/20200221131110/https://www.oecd-ilibrary.org/docserver/9789264293083-en.pdf?expires=1582291562&id=id&accname=guest&checksum=17CABBDA10BD42B36319446FC27A2DF0.
166. Id., at pp. 25-26.
167. Id., at pp. 26-28.

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The key novelty in the 2018 Interim Report for present purposes is its attempt (finally!) to theorize value creation, or at least to place it in the context of some history of the concept. Disappointingly, however, that history begins not with the patriarchs of classical value theory, nor with the reformatory schismatics of the marginalist tradition, but in 1985, with Michael Porter's "competitive advantage" concept, which we met in section 3. The report explains that "[d]iscussions of value creation tend to start with the value chain. Developed by Michael Porter in the mid-1980s, the value chain is a standard tool in academia and business applied to analyse a firm's competitive advantage".[168]

Michael Porter's conception of value is not a quantitative one; it is a managerial one: applying his thinking may help identify specific areas of a firm's activity where competitiveness may be improved, but it does not exist to determine the respective quantifiable contributions to profitability made by those specific areas of a firm's activity. So (like marginalism) it begs the BEPS value-theoretical question. Further, since it presupposes that *all* profitability within a firm is extracted from the market, it is fundamentally agnostic as to the role of market power. For Michael Porter, a component of a firm's activities which is to do with entrenching market power is equally as value-creating as a component which is to do with, say, developing a more efficient manufacturing process. This is a mixed blessing from the point of view of the OECD's purposes: it retains value creation within the bounds of the firm, and therefore obviates any need to re-allocate profitability upstream in global value chains to production, but also therefore constitutes an obstacle to reallocating it downstream in global value chains to consumption. It is therefore unclear why Porter's conception of value has been adopted as the motherlode for these purposes.

The Interim Report does critique the Porterian value chain concept, but not in a manner calculated to inspire confidence that its defects for these purposes have been engaged with. The claim is made that the Porterian value chain suffers from the defect that, unlike the global value chain analytic, it is only to do with domestic firms. But this critique completely misses the point about the global value chain analytic which is that the "governance" exercised by lead firms (alternatively put, market power) is exercised on businesses in the chain that are *not part of the firm at all*.[169] Ironically, given the argument presented here, the other critiques levelled at the Porterian value chain concept in the Interim Report are to do with the fact that it is primarily adapted for use in respect of firms engaged in material production. The report proceeds to describe adaptations of the Porterian value chain concept from management literature which focuses on the business models of (broadly speaking) service providers and information economy actors, and digital economy business models are analysed in detail on the basis of those adaptations, but (being fundamentally inapposite to the task at hand) no conclusions are drawn from the discussion that actually resolve any of the indeterminacies that have plagued this workstream. On the vexed question of the role of data and user participation, Porterian models take a back seat and the report retreats into the fudge of observing that some countries think one thing and other countries think another.[170]

That approach then resurfaces when the Interim Report comes to discussing practical solutions. There is the group of countries who take the view articulated by the United Kingdom

168. Id., at p. 35.
169. *See* section 2.4.
170. Id., at pp. 58-59.

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that the digital economy should be subject to a ring-fenced measure which allocates profitability based on user participation as a form of value creation and there is a group of countries which believes that the problem of taxing the digital economy is really a problem with fundamental tax norms that are made obvious by the digital economy but are in fact endemic in the system. And there is a third group which believes nothing further need be done, or at most that the existing BEPS reforms should be allowed to bed down before anything further is done.[171] It is the second group that seems to have prevailed: the next step which the Interim Report promises is work reviewing those norms; namely nexus, and rules for allocating profits. The Interim Report makes clear that the second group does not even display a consensus within it as to its theory of value creation, and in hindsight it is easy to hear the first death knell of the value creation principle in this call for fundamental norms to be revisited afresh.

In January 2019, a short policy note was issued explaining that work had continued following the Interim Report, and that discussions within the Inclusive Framework had resulted in a way forward.[172] That way forward was presented as standing on two pillars. Pillar One was to consider "several proposals […] that would allocate more taxing rights to market or user jurisdictions in situations where value is created by a business activity through participation in the user or market jurisdiction that is not recognised in the framework for allocating profits." And so, without resolution to any of the theoretical difficulties encountered in the foregoing work, and albeit only implicitly, insofar as that is the direction to which the practical proposals point, "value creation" was to be understood as taking place downstream in global value chains. "Some of the proposals", the note goes on to explain, "would require reconsidering the current transfer pricing rules as they relate to non-routine returns, and other proposals would entail modifications potentially going beyond non-routine returns."

The OECD is keen to prepare the ground for the fact that radical proposals are in train ("[i]n all cases, these proposals would lead to solutions that go beyond the arm's length principle") but in the very articulation of the problem as quoted in the foregoing paragraph, i.e. with the inclusion of the formulation "non-routine returns", there is a radical departure. As we saw in section 3., commentators and consultation respondents have been happy to talk of routine and non-routine profits (since it is used all the time in transfer pricing practice) but the OECD in its BEPS output had up to this point been noticeably unenthusiastic about allowing the distinction to look like it was being formalized. This is no doubt for the reason elaborated upon in section 3. and revisited above, i.e. it exposes the fundamental theoretical flaw in the entire concept of the arm's length principle whereby, if you assume that all the apparently productive activity within the firm takes place internally at competitive margins, additional profits earned by the outside-world-facing firm overall remain unaccounted for and can therefore be squirrelled away offshore. But as practical solutions overtake inadequately theorized characterizations of the problem, so practical characterizations of the problem appear to be taking over, and the role of the "value creation" principle seemingly recedes. Perhaps even more tellingly, Pillar Two involves policy proposal to which the "value creation" principle is conceptually irrelevant. It simply directly targets double

171. Id., at pp. 171-172.
172. OECD, *Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note* (OECD 2019), available at https://web.archive.org/web/20190214124700/http://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf.

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non-taxation of profits, without engaging any of the conceptual conundrums that the "value creation" principle has introduced to the topic of international corporate tax reform.

4.2.3. The February 2019 consultation document: Causal v. quantitative relations again

Shortly afterwards, on 13 February 2019, a consultation document was published in pursuit of the agenda set out in the January policy note.[173] There was no sign in the consultation document of the Porterian value chain model, which seemed to have vanished as suddenly as it had appeared. In its place was the concept of "residual" or "non-routine" profits, which has been lurking in the background since the beginnings of the project in 2010 (as documented in section 3.), but which is only now taking centre stage, being fundamental to two of the three proposals advanced in the consultation document in pursuit of Pillar One. The proposals, we are told, "have the same over-arching objective, which is to recognise, from different perspectives, value created by a business's activity or participation in user/market jurisdictions that is not recognised in the current framework for allocating profits".[174]

Paragraph 13 of the consultation document crystallizes the problem beautifully, in a manner that closely associates it with the ideas explored in section 3. The preceding paragraph had explained the nexus problem – i.e. MNEs making profits in a jurisdiction without any physical (and therefore taxable) presence, and the purpose of paragraph 13 is to explain why the profit allocation issue must also be addressed:

> However, any solution that seeks to address nexus must also address the closely-related issue of profit allocation, or it is bound to fail – with likely increases in uncertainty and controversy without a meaningful increase in income allocation. This can easily be demonstrated by developments already taking place on the ground: in response to the BEPS package (including Action 7), some MNE groups with highly digitalised business models were able to establish local affiliates in market jurisdictions, especially in those jurisdictions constituting the businesses' larger markets. However, the local affiliates are commonly structured to have no ownership interest in intangible assets, not to perform DEMPE [development, enhancement, maintenance, protection and exploitation] functions, and not to assume any risks related to such assets. Accordingly, only a modest return may be allocated to these "limited risk distributors," or LRDs. Thus, without effective changes to profit allocation rules, an MNE group may seek to sidestep the nexus issue by establishing local affiliates that are not entitled to an appropriate share of the group's profit.[175]

What appears to be going on here is actually quite simple. The "bourgeois labour theory of value" – i.e. the compromise struck in relation to the problem of transfer pricing as described in section 3., whereby unproductive labour exerts a gravitational pull on profitability in excess of the aggregate of idealized competitive internal margins – does not bring *enough* of these MNEs' excess profits onshore, and the *assumption* is that the place where they should be brought onshore is market jurisdictions. (The alternatives, e.g. shareholder jurisdictions, or supplier jurisdictions, are no doubt too preposterous even to contemplate, because no reasons for excluding them are offered.)

173. OECD, *Base Erosion and Profit Shifting Project; Public Consultation Document; Addressing The Tax Challenges of The Digitalisation of The Economy* (OECD 2019), available at https://web.archive.org/web/20190314154014/http://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.
174. Id., at p. 8.
175. Id.

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The first of the three proposals, the "user participation proposal",[176] is essentially the United Kingdom's proposal from March 2018. Notwithstanding the OECD's disinclination to ring-fence the digital economy, the proposal is to target specific business models where user participation leads to market power: social media, search and online marketplaces are proffered as illustrations. The "residual or non-routine" profits of MNEs adopting such models would be calculated – "i.e. the profits that remain after routine activities have been allocated an arm's length return" – and a proportion of those profits would be allocated to jurisdictions based on a metric related to user participation. The rationale on which this proposal relies is that user participation gives rise to "value creation", but the veil that the value creation rubric throws over what is essentially a bringing onshore to market jurisdictions of a tranche of the monopoly rents of Facebook, Google, Amazon and so on is gossamer-thin. Indeed, the proposal is nakedly to do with monopoly rents; the proposed metric for user participation is simply revenues!

The second of the three proposals, the "marketing intangibles proposal",[177] is founded on (a) an acknowledgement that the work discussed in section 3. of this article was not enough to solve the problem it sought to address, and (b) a consequent framing whereby the solution to the digital economy taxation problem may be found in an *extension* of the principles deployed in that context. The idea is to carve out a tranche of non-routine profits referable to marketing intangibles and allocate them to market jurisdictions. "The proposal", the consultation document explains, "is intended to be consistent with the principle of allocating profit based on the value creation by firms in that [a] positive attitude in the minds of customers is created by, and the customer information and data is acquired through, the active intervention of the firm in the market." Of course, that active intervention is (as we saw in section 3.) *already* supposed to give rise to allocation to the jurisdiction where the allegedly value-creating unproductive wage labour takes place that is associated with the intangibles in question, and so this rationale is not in fact explanatory of the proposal.

This second proposal therefore constitutes tacit admission that the "bourgeois labour theory of value" cannot do the heavy lifting it was hoped it would do. The document goes on to explain that the problem is that profits associated with marketing intangibles can be shifted away by deploying only "a relatively modest degree of decision-making capacity outside the market jurisdiction". This is of course a consequence of treating labour that is merely causally implicated in profitability as quantitatively implicated in value creation: as with the loan-negotiating labour considered in section 3., the proportionality between the volume of labour and the profitability with which it may be associated is ultimately arbitrary, and it cannot be relied upon as a meaningful value-theoretical linkage between the two.

The third of the three proposals is the "significant economic presence proposal".[178] Only the vaguest gesture is made towards justifying this proposal on the basis of the "value creation" norm. Essentially, it involves conferring nexus on a jurisdiction on the basis of a significant economic presence that doesn't require physical presence, and allocating profitability to that jurisdiction on the basis of a formulary apportionment of the MNE's global profits.

176. Id., at pp. 9-11.
177. Id., at pp. 11-16.
178. Id., at pp. 16-17.

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The Pillar Two proposal,[179] likewise, is essentially unencumbered by any substantive claim to being founded in the "value creation" principle, and will not be considered further here.

4.2.4. Responses to the consultation: A fresh terrain of compromise?

The consultation responses form a truly vast body of observations on these proposals.[180] Unsurprisingly in view of the foregoing, though, very little of it framed itself in any meaningful way around the concept of value creation. The concept of course surfaces as shorthand for the BEPS compromise settled in 2015, insofar as the proposed reforms are departures from it: "[c]areful consideration should be given to major departures from existing principles", warn PwC, for example, "and to their [...] consistency with the economic rationale (value creation) that forms the foundation of the current international tax regime".[181] The consultation document, complained the American Petroleum Institute, "seems to disregard the base premise for the BEPS project, which is to ensure taxation where value is created".[182] "[T]he proposals under Pillar I", observe the Confederation of Finnish Industries, "are not in line with aligning taxation with value creation approach adopted in the BEPS project".[183] Other respondents, notably Ernst & Young,[184] simply make no mention of it.

Many respondents expressed concern that the reforms would be arbitrary and unevenly imposed among jurisdictions, and (as if to highlight the total vacuity of the value creation principle on a practical level in this context) pleaded for them to be founded on principle. (ICAEW, for example, "believes that there need to be clear principles to underpin any new proposals".[185]) A brave few persisted in articulating this plea under, rather than in spite of, the value creation rubric, for example Grant Thornton: "we believe that the TFDE needs to provide greater detail regarding how to determine the underlying value that is created within the taxable base and how to identify who effectively creates the value".[186] Many respondents thought it appropriate to signal their impression that the proposed reforms represented a substantive departure from the separate entity principle and the arm's length principle. Of course this charge had been levelled at the OECD throughout the BEPS process, since those principles were the underpinning of the pre-BEPS system, but the corporate sector seems by this stage to have persuaded itself that the compromise effected between the arm's length principle and the gravitational pull of "value creation" in the sense elaborated in section 3. (i.e. Grinberg's "bourgeois labour theory of value") did not ultimately represent a detachment from that underpinning. In the context of these ubiquitous calls for a substitute principle, however, the charge seems to stick. "Should the Inclusive Framework decide to move away from the ALP and single entity approach," submitted PwC, "clear guidance will be required, preferably outlining a flexible and principles-based approach, or a detailed and mechanical approach with the view of reducing uncertainty and complexity for all stakeholders".[187]

179. Id., at pp. 24-29.
180. The responses are available in a Dropbox folder linked to from this page: OECD, *Public comments received on the possible solutions to the tax challenges of digitalisation* (OECD 2019), available at https://www.dropbox.com/s/zrj1e14mdxd7fmv/OECD-Comments-Received-Digital-March-2019.zip?dl=0.
181. PwC response to OECD consultation, *supra* n. 180.
182. American Petroleum Institute response to OECD consultation, *supra* n. 180.
183. Confederation of Finnish Industries response to OECD consultation, *supra* n. 180.
184. Ernst & Young response to OECD consultation, *supra* n. 180.
185. ICAEW response to OECD consultation, *supra* n. 180.
186. Grant Thornton response to OECD consultation, *supra* n. 180.
187. PwC response to OECD consultation, *supra* n. 180.

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As regards the specific proposals, the "user participation" proposal and the "significant economic presence" proposal were both deeply unpopular. In the case of the latter proposal, it was almost universally rejected out of hand as being back-door formulary apportionment, which had already been rejected by the OECD at the outset of the BEPS process. Indeed perhaps the most meaningful use of the value creation concept in the entire body of responses was the argument that, whatever the value creation principle means, formulary apportionment runs counter to it. As regards the "user participation" proposal, only a handful of respondents were persuaded by the idea of ring-fencing the digital economy. UK-based AstraZeneca, with a vast intangibles portfolio and negligible user participation, was one,[188] but most respondents considered that the integration of digitalized business practices with more traditional sectors made the distinction – and therefore the "user participation"-based reform trajectory – impossible. "We do not believe that the concept of user participation is able to deliver the clear-cut boundary necessary to define the scope of this approach", wrote the Swiss Business Federation, for example.[189] In many instances the objection was also articulated in such a way as to expressly pour scorn on the idea that the value creation principle was meaningful in this context; as was the case with the submission of the Digital Economy Group:

> We are troubled that the Consultation Document seems to adopt the approach of speaking about value creation so as to deemphasize value creation by the enterprise, for example when it refers to "value generated by user participation". This form of expression obscures the hard questions: Who exactly is the relevant value creator for purposes of corporate income taxation? At what physical location does that person actually create whatever value is created through user interaction? What exactly about interacting with users is the value-creating activity? Finally, once those questions are sorted out, how do the answers justify a changed nexus rule for cross-border transactions? And why shouldn't that justification apply to all remote sales of goods and services rather than be limited to only a particular sector (and a subset of that sector, for good measure)?[190]

Inevitably, then, the "marketing intangibles" emerged as the least worst option by default. Seemingly respondents saw in it an opportunity to produce a fresh terrain of compromise between capital and the state, perhaps in the form of further concessions to the bourgeois labour theory of value. "People-based functions (including those related to the control and decision-making around risks and the development of assets) carried out by employees of a business remain an important driver of business value," explain Deloitte, for example, "and the locations where activities are performed (including research and development and sales and marketing) must continue to receive an appropriate reward under any new proposal".[191] The idea is encapsulated by the Digital Economy Group, who suggest that the reforms should "bend" but not "break"[192] the arm's length principle.

Indeed there appears to have been some hope that the principle would not really have to bend very far: "[i]n most interactions," suggest PwC, "the [arm's length principle] produces outcomes that are acceptable to businesses and governments, but there does need to be change if countries agree that they want to recalibrate or fine tune where profit should be considered to arise for corporate tax purposes." "It will be important to recognize", explain KPMG, "that residual profit is derived from a variety of activities, and that the share attrib-

188. AstraZeneca response to OECD consultation, *supra* n. 180.
189. Swiss Business Federation response to OECD consultation, *supra* n. 180.
190. Digital Economy Group response to OECD consultation, *supra* n. 180.
191. Deloitte response to OECD consultation, *supra* n. 180.
192. Digital Economy Group response to OECD consultation, *supra* n. 180.

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utable to marketing intangibles may be a relatively modest amount of the total residual profit".

What is particularly fascinating about this point, as taken by KPMG, is the apparent acceptance of the overall presupposition of the entire "BEPS 2.0" process, which is that there exists a bundle of untaxed surplus profitability – over and above the aggregate of competitive internal margins – that is available for reallocation. Not all the respondents accepted this premise: for example, the Confederation of Swedish Enterprise (alongside other Scandinavian bodies and firms) argued that the reallocation to market jurisdictions "would essentially mean an arbitrary shift of taxable income from smaller net exporting countries with high levels of R&D-activities and associated entrepreneurial risk taking to larger net importing jurisdictions with large consumer bases", but generally among respondents there was remarkably little push-back against the idea that the residual profitability being targeted by these proposed reforms was out there. It is as if we have almost (i.e. not expressly) come full circle back to the point where we began in 2010 with PwC innocently suggesting that "it would be helpful if [the OECD working party] considered the issue of economic rent and, in particular, consider whether it would be appropriate to set out some of the principles involved".[193] By a circuitous route, the OECD has in effect considered that issue, and the answer seems to be that at least some of it should be allocated to the markets out of which the rent is realized.

What is absent, of course, as already observed, is the underlying principle on the basis of which to send it in the direction of the market jurisdiction, and it is in the resulting void that the BEPS process comes face to face with not just its own value-theoretical shortcomings but the shortcomings of marginalism more generally. "We believe that there is no principled basis for the notion that an enterprise creates value at any place other than where it deploys its personnel, invests in and manages its assets, and bears and manages its risks," explain the Digital Economy Group. "What is it about a "market" that justifies the allocation of more profit to that jurisdiction?"[194] "What is the appropriate balance between the reward to innovation (R&D, entrepreneurial risk-taking, etc.)", ask OECD's Business and Industry Advisory Committee, "and the reward to the destination/market? And, in particular, what does economic theory and practice tell us about that?"[195]

These questions recall the proposition encountered in the introduction to this article, where Devereux and Vella posited (in 2018, and apparently not wholly seriously) that the doctrine of allocating profits in accordance with the location of value creation would imply, if understood in the context of modern marginalist value theory, that allocation should be split between the location of supply and the location of demand. And indeed one respondent to the consultation went there, saying that "the tax base for income tax or corporate tax is constituted not by value addition undertaken within the supply chain, but by profits of business enterprises. Such profits are generated by the excess of sales revenue over costs, and are accordingly contributed by both demand and supply. Thus, [we consider] it essential to take both demand and supply side factors into account in any measure aimed at allocation of profits." (That one respondent was the G-24, representing around 44% of the population

193. PwC, *supra* n. 77.
194. Digital Economy Group response to OECD consultation, *supra* n. 180.
195. BIAC response to OECD consultation, *supra* n. 180.

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of the world![196] The proposition seems to have been an *ad hoc* one in this context, however, and does not form part of a consistent theoretical position adopted on behalf of major Global South economies.)

4.2.5. The May 2019 Programme of Work and the end of the value creation principle

As we saw in section 2., mainstream Marxists consider that the boundary between value creation and value capture lies around (broadly speaking) material production. And this conclusion is consistent with the dominant sense among the consultation respondents that the profits of the digital economy cannot be ring-fenced; the operations of modern businesses all comprehend at least a certain amount of (as it were) "unproductive" business functions. No one is merely a producer of material commodities – everyone has design, branding, marketing and so on. Value capture penetrates every firm's Porterian "chain" of value creation.

"There is no inherent economic difference in how an enterprise goes about creating value in its business by investing in its product and in its customers", offer the Digital Economy Group; "[i]n both cases, companies take risks and make investments in order to develop superior products and to build market presence." They mean to bring investment in market position within the ambit of what is considered productive but, ironically, Marx would agree that there is no difference. Recalling the analogy of the match and the fire from section 2.3., which distinguishes *causes* of value being realized in exchange for that which actually *creates* value, both investment in product development and investment in market position are in the match category: *neither* creates value. By the same token, the analysis of the vast profits in the digital economy as economic rent in excess of what the aggregate of its functions should earn in the market (as inferred above) is ultimately inadequate. As the International Bar Association asked in its consultation response, "What are the routine activities in digital businesses?"[197] *All* of, say, Facebook's revenues represent value capture. Ultimately, the fact that it has to have actual operations in order to effect that value capture is neither here nor there. There is no immaterial production. Only material production and value capture.

On this analysis, the problem that the BEPS process had been running up against is a simple contradiction. On one limb of the contradiction, there is the fact that the taxation of corporate profits involves the taxation of both value creation and value capture, and so there is nothing in the principles of the tax that enable a distinction between the two. This elision between value creation and value capture is exacerbated by the fact that value capture can involve the deployment of resources within the firm – notably (as we saw in section 3.) labour, which can generally be quite clearly located. And on the other limb of the contradiction, there is the fact that the mechanism *through* which value capture is achieved – the market – is (as the vast majority of the responses to the February 2019 consultation considered in this section demonstrate) quite obviously not a location of value creation in any meaningful sense.

The solution to this contradiction adopted by the OECD was essentially to abandon the value creation principle altogether. The policymaking process discussed in this section

196. Intergovernmental Group of Twenty-Four response to OECD consultation, *supra* n. 180.
197. International Bar Association response to OECD consultation, *supra* n. 180.

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continues, and indeed at the time of this article's going to print appears to be coming to fruition, but from the perspective of the story of value creation it ended with a document, published in May 2019: the OECD's Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy.[198] In terms of the substantive outcome, what the Programme of Work does is observe that the three suggestions it ventilated in the consultation document have features in common (i.e. nexus without physical presence and allocation of profitability to market jurisdictions), and the next steps will involve building consensus around those common features. What it does *not* do is characterize that further work as being entered into in pursuit of the principle of allocating profitability to where value is created. "Value creation" is still cited as a guiding principle,[199] or even occasionally deployed in the broad vague sense critiqued by commentators since the outset of the BEPS process,[200] but the decade of value-theoretical free-for-all as between the club of rich states and big corporate capital is over.

5. Conclusions

In section 3. we saw that the arm's length principle is inherently liable to create residual profits accumulating in offshore spaces. Further, also in section 3, we saw that the OECD's initial response to the crisis this phenomenon was creating for tax states globally was to allocate (at least to an extent) the residual profitability to labour implicated in value capture. In section 4. we saw how this response was found to be inadequate, and the further response was to allocate profitability to the markets in which value capture takes place. This effects a rupture in the principle whereby only activities within the firm are treated as generating the profits on which corporate income tax bites, giving taxing rights to jurisdictions outside the boundary of the firm. Crucially, however, that rupture is only in respect of consumer markets; there is no rupture of the boundary between the firm and the rest of the sphere of production. While allocation downstream in the global value chain is possible, allocation upstream continues to be impossible.

This is clearly of global distributional concern. In its response to the February 2019 consultation, the World Bank observed that "while some of the jurisdictions we work with [i.e. "developing" economies] represent significant markets in their own right, and markets that are increasingly digital, their value by comparison to developed markets is going to be smaller because their consumers have less purchasing power. Moreover, activity at the other end of the value chain, production of raw materials and manufacture, is a proportionately more significant part of their economies".[201]

The geopolitics of the matter is for scholars of international political economy, international relations and so on, but a core contribution of this article is to offer a value-theoretical framing for those geopolitics. Put simply, the state may be encroaching upon corporate capital's untaxed surplus by means of corporate tax reforms, but it is doing so in a way that

198. OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy* (OECD 2019), available at https://web.archive.org/web/20190531212946/http://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.
199. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* p. 3 (OECD 2020), available at https://web.archive.org/web/20201030223413/https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm.
200. Id., at p. 20.
201. World Bank response to OECD consultation, *supra* n. 180.

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perpetuates inequalities between states, by retaining the allocation of the tax base predominantly outside the classical production boundary. Pre-BEPS it was to be found to a great extent offshore. BEPS brought some of it onshore by reference to unproductive labour, and BEPS 2.0 proposes to bring more of it onshore by reference to value absorption in the sphere of consumption. And the story of this trajectory may be told through the rise and fall of the concept of “value creation” in the relevant technocratic discourse. In section 3. we saw that “value creation” came to mean unproductive labour implicated in value capture, and in section 4. we saw the OECD swerve between postoperaismo, Michael Porter’s value chain, and a kind of metaphorical deployment of the language of marginalism to non-monetary transactions, while the representatives of capital have advanced a seemingly pre-classical mercantilist conception of value. No-one has entertained the possibility that Smith, Ricardo and Marx (or at least Marx as traditionally understood) might have been right to locate “value creation” where material production takes place.

To proceed in this way is to overlook one of the most fundamental structural features of capitalism today: the fact that the labour which goes into creating value (i.e. value as understood in that classical analysis – the value that is reflected in the material conditions of our lives) is disproportionately cheap and disproportionately concentrated in low-income countries. This is not to say that the fact that material production tends to benefit from cheap labour in low-income countries goes overlooked; it does not. The claim here is specifically that it is overlooked as a *structural* feature. The labour in question is not an arbitrary category of labour which just happens to be disproportionately cheap and disproportionately concentrated in low-income countries; it is specifically *the very labour that is value creating*.

If it is the case, as traditional Marxism and the “monopoly capitalism” school of analysis would contend, that all the value in the system is indeed created at the bottom of the smile curve where that labour is performed, then the consequent fiscal inequities between states are savage. In this analysis, both wages and profitability are being suppressed in low-income countries, leading to fiscal shortfalls, and while profitability is also being suppressed in rich countries, they at least have the benefit of the tax base represented by relatively well-remunerated unproductive labour. But, crucially, the value accessible in that tax base is extracted from low-income countries by means of the monopoly power that that very labour exists to exercise in global value chains.

Some relief from these consequent fiscal inequities between states would follow from placing improved fiscal resources in the hands of those states where value creation in this classical sense takes place. And yet at no stage in any of the discussions we have been investigating in this article (or in related multilateral discussions around international corporate tax policy) did any of the participants suggest adopting a theory of value that would result in the “value creation” mantra having that effect. And this despite the inoperability of mainstream marginalism in this context and the flirtations with a diversity of (in some instances wildly heterodox) value-theoretical positions.

It might be said that it is impossible within the constraints of existing international corporate tax norms to allocate taxing rights upstream in global value chains to where the value (as classically understood) is created, because to a large extent that value is not created within the MNE group where the taxable profitability accrues. But as we saw in section 4., the participants of the discussions in question have shown themselves perfectly able to countenance the allocation of taxing rights *downstream* in global value chains to the

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market jurisdictions where it is absorbed. So why not upstream? Or, to put it another way, why may sales *into* a jurisdiction constitute an economic presence, but not purchases *from* a jurisdiction? Why may these norms bend in one direction but not the other? Why, since the state is encroaching upon global corporate capital's untaxed surplus by means of international corporate tax reforms, must it do so in a way that (a) retains the allocation of the tax base predominantly outside the classical production boundary, and thereby (b) perpetuates inequality between states?

This article does not serve to answer that question; the bare fact that that is what is going on (as elaborated upon in sections 3. and 4.) constitutes this article's core conclusion. But it is tempting to speculate in the context of these concluding thoughts as to the answer to that question of *why*. The speculative answer offered here is that the international norms and institutions that effect distribution of revenues between states have imperial domination baked hard into them. The imperialist ideology giving rise to the structural asymmetries in the international system is so deeply embedded that the questions that expose that ideology to view – such as why sales into a jurisdiction may constitute an economic presence, but not purchases from a jurisdiction – do not even seem to get asked. And even if the questions do get asked, any alternative norms and propositions that might offer serious resistance to the structural asymmetries at play here (whether those norms and propositions be fiscal or value-theoretical) generally strike the liberal technocratic minds of the global economic core as so obviously erroneous as to be undeserving of serious engagement.

What that serious engagement might look like on a practical policy level if it took place in the context of international corporate tax reform has been considered elsewhere, and the suggestion of "unitary taxation by formulary apportionment of the entire value chain" has been offered.[202] In summary, this means collecting tax from MNEs based on group profits and then allocating the tax between the jurisdictions in which they have an economic presence in accordance with a formula but (in contrast to the existing proposal of unitary taxation by formulary apportionment) including for these purposes jurisdictions upstream in the MNE's value chains. Obviously even with such a system in place the apportionment factors could be stacked in favour of rich countries (e.g. by placing emphasis on sales and payroll as opposed to headcount and tangible assets). But, with an equitable formula, unitary taxation by formulary apportionment of the entire value chain should mean fiscal transfers from high-income countries to low-income countries.

202. C. Quentin, *Corporate Tax Reform and "Value Creation": Towards Unfettered Diagonal Re-allocation across the Global Inequality Chain*, 7 Accounting, Economics and Law: a Convivium 1, pp. 1-21 (2017).

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