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Dodging the Constitution for a Global Tax

Treasury plans to adopt a new treaty without a proper Senate vote.

By The Editorial Board

President Biden's corporate tax-rate increase appears to be dead, but Treasury Secretary Janet Yellen still wants to whack U.S. companies through her global tax deal. And she is planning an end-run around the Constitution to do it.

Ms. Yellen has broken a long bipartisan consensus to sign onto new global tax rules being negotiated at the Organization for Economic Cooperation and Development. The deal comes in two "pillars" in the argot. Pillar one introduces a new method for determining which governments get to tax the revenues of the world's 100 or so largest companies. Pillar two is a global minimum corporate profits tax with a rate of 15%.

Each country will need to implement this agreement in its domestic tax law, which is where Congress comes in. Pillar one is a particular headache for Ms. Yellen. Existing bilateral and multilateral tax treaties specify how governments carve up corporate revenue for tax purposes. The OECD anticipates similar treaties to enshrine the new rules.

But that would require Ms. Yellen to corral 67 Senators to support the OECD tax plan as a treaty, and there's no chance of that. So Treasury is looking to circumvent the treaty process. One idea is a so-called <u>congressional-executive agreement</u>. This could enshrine the elements of a treaty in U.S. law, but would require support from both chambers, including a filibuster-proof 60 Senate votes.

Or the Administration can try—you knew this was coming—reconciliation. This would allow Democrats to pass the revenue-related parts of pillar one with 50 Senate votes plus the Vice President. This will probably be the Administration's preferred option.

It's also by far the worst. The OECD's version of pillar one includes important provisions such as a dispute-resolution mechanism. This would offer American companies a formal method for contesting foreign tax demands if officials around the world try to stretch the meaning of the OECD deal as they apply it. But since that mechanism doesn't weigh directly on revenue, Senate rules may bar it from a reconciliation bill. U.S. companies would lose the legal certainty that's supposed to be the only benefit for them in this deal.

A congressional-executive agreement could include the dispute-resolution provision. But foreign governments that have ratified their own treaties would still have to decide whether to accept this legislative ploy as a treaty equivalent. American companies would have to hope they do, especially when the new text is at odds with existing tax treaties.

Foreign governments, especially in Europe, have been burned before by Democratic Administrations that didn't submit major international agreements for Senate ratification. The Iran nuclear deal and Paris climate accord come to mind. They might reasonably expect Ms. Yellen to show she can deliver a tax deal that's more permanent than those agreements turned out to be.

Several of those governments have a stick in the form of the digital-services taxes they're already imposing on U.S. tech giants such as Facebook and Amazon. The U.K., Italy and the others are supposed to ditch those taxes once pillar one comes into force. Will they if Ms. Yellen hasn't delivered a proper treaty?

Either of these non-treaty gimmicks raises the prospect that U.S. companies could get all the tax increases of the OECD deal but none of the legal protection—and still face foreign digital taxes to boot. Dodging proper constitutional procedure always turns out badly.