Aitor Navarro

An International Tax Law Research Agenda

Max Planck Institute for Tax Law and Public Finance
Working Paper 2023 – 11

October 2023

Max Planck Institute for
Tax Law and Public Finance

Department of Business and Tax Law
Department of Public Economics

http://www.tax.mpg.de

Max Planck Institute for Tax Law and Public Finance
Marstallplatz 1
D-80539 Munich
Tel: +49 89 24246 – 0
Fax: +49 89 24246 – 501
E-mail: ssrn@tax.mpg.de
http://www.tax.mpg.de

An International Tax Law Research Agenda

~

Aitor Navarro[*]

This essay briefly addresses future research avenues in international tax law. It aims to provide a brief overview of the topics that will likely be explored in this field. To do so, it establishes a framework to delineate the scope of international tax law and a briefing on its evolution. Afterwards, it establishes its current state of play and defines building blocks for future research. To illustrate paths to future research, five specific topics are addressed, namely the expansion or contraction of anti-BEPS rules, tax sovereignty and tax competition after minimum taxation, the taxation of economic rents in market jurisdictions, the formulaic allocation of taxable bases and the exploration of new ways to further multilateralism.

I. The scope of international tax law as a research field 2
II. A briefing on the evolution of international tax law 4
III. The current state of affairs and the building blocks for future research 6
IV. Topics for future research on international tax law 8
A. Expansion or contraction of anti-BEPS rules? 8
B. Tax sovereignty and tax competition after minimum taxation 9
C. Taxation of economic rents in market jurisdictions 11
D. Beyond the arm's length standard – formulaic allocation of taxable bases ... 13
E. Exploring new ways to further multilateralism 15

* Senior Research Fellow, Max Planck Institute for Tax Law and Public Finance. This is the manuscript version of the chapter titled 'A Research Agenda for Tax Law' of the Research Handbook on International Taxation edited by Leopoldo Parada and published in 2022 by Edward Elgar Publishing Ltd. See disclaimer at the end of the document. The author may be contacted at aitor.navarro@tax.mpg.de.

I. The scope of international tax law as a research field

International tax law is a relatively new subject within law disciplines that has developed as rapidly as globalization. As the delineation of the jurisdiction to tax cross-border events is at the core of this field, the removal of trade barriers exacerbates the relevance of the tax regulations impacting cross-border events. Almost all topics comprised by international tax law may be explained by the necessity of a certain nexus that allows a country to exercise its taxing powers and the interaction between the regulations of different countries exercising it at the same time – and the resulting outcomes of this phenomena. For instance, the elimination of double taxation, one of the most prominent international tax law topics, is the result of the reaction to the overlapping taxing rights of two jurisdictions. Likewise, the recent international trend to fight base erosion and profit shifting addressed certain outcomes on the interaction of the tax regulations of different countries that often lead to low or no taxation[1]. Even the new –yet-to-be implemented – consensus that is built around the granting of taxing rights to market jurisdictions and the adoption of minimum taxation is also referred to as the exercise of taxing powers and their limitations[2].

To systematically approach the subject matter, the usual classification between substantive and procedural law may be adopted. Substantive international tax law refers to the rules that define the tax treatment of a cross-border event, i.e., a public, coactive, and compulsory burden imposed on any manifestation of wealth that is either income, property, or consumption. Procedural international tax law denotes the set of regulations that exist to secure that the transfer of resources from the taxpayers to the public revenue will effectively occur. These rules range from those concerning the obtention and exchange of information to dispute resolution. All new developments affecting the international tax law system of rules correspond with the said distinction. Parallel to the existence of the indicated rules, an institutional superstructure exists that favours cooperation among the involved economic agents – mainly countries – and instigates the adoption of new rules and standards. It comprises institutions such as the OECD, the G20, the UN, the European Union, and many others. This rather brief definition of the scope and content of the international tax law discipline is just a commencement for defining the scope of the present chapter that will primarily deal with substantive tax law. Such a scope must be rather narrow, however, to avoid overlapping with the contents of the rest of the chapters of this book that discuss relevant topics that may be comprised in the more general category of international tax law. For instance, this chapter will focus exclusively on

[1] See OECD, *Addressing Base Erosion and Profit Shifting* (2013). See a summary of the outcomes of the BEPS project in OECD, *OECD/G20 Base Erosion and Profit Shifting Project. 2015 Final Reports - Executive Summaries* (2015).

[2] See the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy in OECD, *Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, 10 (2021).

direct taxes. This is not only because international tax law usually excludes indirect taxes – sales taxes, excise duties, custom duties – in order to focus almost exclusively on income taxation. It is also because there is a chapter in this book focused on constructing an indirect tax law agenda as well as a chapter on environmental challenges and tax law[3]. This also applies for those chapters dealing with the building blocks of any modern tax system – fundamental rights and inequality, including racial issues – and a topic very much affecting the future of international tax law, specifically the impact of new technologies[4]. European Union related issues will also be – almost completely – omitted from the scope of this chapter[5].

Additionally, it must be stated that comparative tax law analyses are generally not considered an element of the international tax law discipline unless they refer to the topics previously mentioned. For instance, comparative studies on topics such as taxpayer constitutional rights or tax-related penalty/criminal regulations are not considered part of the field even when they might affect cross-border transactions because their scope primarily refers to domestic tax regulations. Yet, comparative research has contributed to understanding how countries face the same issues and tend to respond in a similar manner. Hence, despite being excluded from the scope of the chapter, it constitutes an important part of the research undertaken in the field of tax law. It also helps for understanding the standardization process that is very much affecting every aspect of tax law and not only international tax regulations[6].

From a purely research perspective, although this chapter will exclusively focus on the legal aspects of international taxation, it is important to accentuate the strong interdisciplinary component that exists in this field as it is currently extensively being explored. It is interesting to note that each building block of international tax law is intimately related with a field of study outside of law. Specifically, substantive tax law is significantly influenced by economics[7], procedural law by information processing science – e.g., new technologies on data processing and transactional technologies –[8] and the institutional analysis by political science[9]. The truth is that all fields are in continuous interaction with each other, and their delineation is a difficult task, albeit these connections are perhaps the most evident. Strictly from the perspective of law as a research discipline, it must be stressed that the two traditional methods for

[3] See Marta Villar, in Chapter 4 of this book (Environmental challenges and tax law).

[4] See Philip Baker, in Chapter 1 of this book (Fundamental rights and tax law); Dan Shaviro, in Chapter 5 (Tax law, inequality and redistribution: recent and possible future developments); Alice Abreu, in Chapter 6 (Racial issues in tax law), and Luisa Scarcella, in Chapter 4 (New technologies and tax law).

[5] See Rita Szudoczky, in Chapter 9 of this book.

[6] For a critical review of comparative tax law as a research method, see Omri Marian, 'The Discursive Failure in Comparative Tax Law' [2010] 58(2) The American journal of comparative law 415. See also Kim Brooks, 'Hitchhiker's Guide to Comparative Tax Scholarship' [2020] 24(1) Florida tax review 1.

[7] See e.g. Daniel Shaviro, 'Economics of Tax Law' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics* (Oxford University Press 2017)

[8] See Luisa Scarcella, in Chapter 4.

[9] See, e.g. Allison Christians, 'BEPS and the new international tax order' [2016] 2016(6) Brigham Young University law review 1603.

approaching research on international tax law refer to either the interpretation of existing regulations and legal principles[10], to tax policy propositions based on normative standards[11], or a mix of both. Due to the recent steps towards the rebuilding of the international tax regime, policy-based research has clearly won prevalence over interpretation-based research. Realizing this difference is relevant in order to more effectively judge the pertinence, scope, structure, and aim of research work on international tax law.

Once these basic considerations on research in the field of international tax law and the scope of the chapter are explained, the chapter will be structured as follows. Section 2 provides a briefing on the evolution of international tax law in order to provide sufficient context for understanding the current state of affairs. Section 3 provides insights on the latest developments in the field that serve as a departure point to the analysis in section 4 of topics for future research.

II. A briefing on the evolution of international tax law

The objective of this section is to present a briefing on the evolution of international tax law that will allow the author to better delineate future research in the field. The emergence of international tax law is closely related with the expansion of income taxes which became one of the main revenue sources of states especially during the First World War to finance war machinery and afterwards with the consolidation of the welfare state model. The increased relevance of such tax generated frictions in international trade that were addressed during the 1920s under the aegis of the League of Nations[12]. The agreements achieved in that decade implied the consolidation in the long run of several international tax law paradigms such as the exclusive taxation of business profits at residence unless physical presence exists in the other country in the form of a permanent establishment[13], reduced taxation of passive income at source, the elimination of remaining double taxation in the state of residence through exemption or credit, or the prevalence of the arm's length standard to allocate taxing rights on business profits, among others. All of these paradigms were included in bilateral tax treaties that not only served to address the elimination of double taxation but also extended a set of standards that significantly impacted the

[10] See, e.g. Jens Wittendorff, *Transfer pricing and the arm's length principle in international tax law* (Kluwer Law International, 2010), interpreting existing transfer pricing regulations.

[11] See, e.g. Michael P. Devereux and others, *Taxing profit in a global economy* (Oxford University Press, 2021), drafting proposals for a Residual Profit Allocation by Income and a Destination-Based Cash Flow Tax.

[12] See Sunita Jogarajan, *Double Taxation and the League of Nations* (Cambridge tax law series, Cambridge University Press, 2018).

[13] The concept of a permanent establishment is generally defined as a fixed place of business through which the business of an enterprise is wholly or partly conducted. It usually includes operation in a foreign country through dependent agents. Each specific tax treaty defines the concrete scope of the concept which virtually always requires a certain form of physical presence. See Arvid Aage Skaar, *Permanent establishment: erosion of a tax treaty principle* (Kluwer Law International BV, 2020).

drafting of the cross-border component of income taxes at the domestic level[14]. After World War II, the OECD assumed the task of preserving and expanding this status quo. The influence of the United States in the shaping of regulations on cross-border income taxation must also be accentuated as US regulations were often reproduced by countries worldwide, e.g., in the adoption of the credit method to eliminate double taxation[15], the sophistication of transfer pricing regulations[16], or the adoption of special anti-abuse rules such as the controlled foreign corporations' regime[17]. In accordance with the described panorama, it could be affirmed that international tax law – at least until the 1990s – was circumscribed to the analysis of domestic rules impacting cross-border taxation – including anti-abuse rules – and tax treaty related issues. The first significant addition to the indicated topics refers to the discussion on harmful tax competition, especially after the publication of the 1998 report on the topic by the OECD[18]. It spotted an issue that has become one of the most relevant topics in international tax law since then, specifically, the effects of tax competition by states that are willing to attract investment by reducing their effective tax rates[19]. Yet, such work produced relevant effects mainly at the level of the European Union[20] but did not lead to significant changes to the international tax regime at that time.

The event that unchained the most thorough revision to the described standards in international tax law was the financial crisis of 2008. The need to raise revenues to either finance countercyclical policies or to compensate for the dramatic drop in corporate tax revenue collection was pressing. This fact, paired with certain scandals that reached the mainstream media, gave rise to the BEPS Project, an initiative by the OECD and the G-20 aimed at fighting base erosion and profit shifting[21]. It resulted in the issuance of recommendations on 15 action points that have significantly

[14] On the interpretation of tax treaties, see Ekkehart Reimer and Alexander Rust, *Klaus Vogel on Double Taxation Conventions* (Fifth edn. Kluwer Law International, 2021).

[15] Cfr. Section 904 IRC and OECD, *Model Tax Convention on Income and on Capital. Condensed Version* (2017), commentary on Article 23.

[16] Cfr. section 482 IRC and section 1.482 of the US Treasury Regulations with the OECD, *Transfer Pricing Guidelines* (2017) and UN, *Practical Manual on Transfer Pricing* (2021).

[17] Cfr. Subpart F IRC – Controlled Foreign Corporations and OECD, *Designing Effective Controlled Foreign Company Rules. Action 3: 2015 Final Report* (2015).

[18] OECD, *Harmful Tax Competition: an Emerging Global Issue* (1998)

[19] See, e.g. Reuven S. Avi-Yonah, 'Globalization, tax competition, and the fiscal crisis of the welfare state' [2000] 113(7) Harvard Law Review 1573. Diane Ring, 'Democracy, sovereignty and tax competition: the role of tax sovereignty in shaping tax cooperation' [2009] 9(5) Florida tax review 555. Lilian V. Faulhaber, 'The trouble with tax competition: from practice to theory' [2017] 71 Tax Law Review 311.

[20] See the creation of the Code of Conduct for business taxation in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997 and the 1999 Primarolo Report (EU Council, SN 4901/99), that identified 66 measures with harmful features in the EU and associated territories. See Martijn F. Nouwen, *Inside the EU Code of Conduct Group: 20 Years of Tackling Harmful Tax Competition* (IBFD doctoral series, IBFD, 2021).

[21] See Yariv Brauner, 'What the BEPS' [2014] 16(2) Florida Tax Review 55

furthered the standardization of domestic and tax treaty law[22]. It has given rise to the highest level of multilateralism and cooperation ever seen in the field. This is illustrated by the adoption of the first significant multilateral treaty on international tax matters – referred to as the multilateral instrument (MLI)[23]– to facilitate the implementation of BEPS measures at a treaty level. The Inclusive Framework[24], comprising 140 countries, was created to impulse the adoption of BEPS minimum standards. Additionally, of great relevance is the Global Forum on Transparency and Exchange of Information for Tax Purposes that counts 163 jurisdictions agreeing on the adoption of standards on the exchange of information on request and automatic exchange.

III. The current state of affairs and the building blocks for future research

The wide-reaching implementation of the BEPS Project alongside the level of cooperation achieved have already dramatically transformed the international tax regime. The adoption of anti-BEPS measures at the level of domestic and treaty based substantive tax law, new information duties and exchange of information mechanisms, and dispute resolution options are more far reaching than ever, both in terms of their standardization and their widespread distribution. Yet, the BEPS Project was not conceived to change the existing international standards on the allocation of taxing rights on cross-border income[25]. Notwithstanding, the adoption of unilateral taxes targeting MNEs profits – mainly those of the US – such as the diverted profits tax in the UK[26], the equalization levy in India[27], and the digital service taxes in several European jurisdictions[28] led to strong opposition from the Trump administration which threatened the stability of a recently renewed international tax regime. The OECD saw momentum and directed all of its resources to embark itself in what had seemed unconceivable only a few years before, specifically, a consensus-based solution on the taxation of MNEs. Although the scope of this new project was initially targeted towards the digitalized economy, the outcome – after a brief but

[22] See Ruth Mason, 'The Transformation of International Tax' [2020] 114(3) American Journal of International Law 353. Cfr. Leopoldo Parada, 'Full Taxation: The Single Tax Emperor's New Clothes' [2021] 24(2) Florida Tax Review 729.

[23] The official name is “Multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting”. See Ana Paula Dourado ed., *International and EU tax multilateralism: challenges raised by the MLI* (IBFD, 2021)

[24] See A. Christians and L. van Apeldoorn, 'The OECD Inclusive Framework' [2018] 72(4/5) Bulletin for International Taxation 226.

[25] OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), 11.

[26] For an overview, see Dan Neidle, 'The diverted profits tax: flawed by design?' [2015] 2015(2) British tax review 147.

[27] See Sagar Wagh, 'The taxation of Digital Transactions in India: the new equalization levy' [2016] 70(09) Bulletin for International Taxation 538.

[28] See a recent account in Young Ran (Christine) Kim, 'Digital Services Tax: Cross-Border Variation of the Consumption Tax Debate' [2020] 72(1) Alabama law review 131.

intense process of negotiations[29]– resulted in measures that apply regardless of any digitalization component. The consensus reached in October 2021 by 137 countries comprises two pillars, namely, Pillar One on the allocation of taxing rights to market jurisdictions regardless of physical presence and Pillar Two, a global anti-base erosion (GloBE) proposal to achieve minimum taxation[30].

Pillar One comprises three measures. The most salient – referred to as Amount A – consists of the recognition of a taxing right to market jurisdictions, i.e., where the consumers are located, and is calculated as a percentage of the residual profits to be allocated to that market. Only MNEs with a global turnover above EUR 20 billion and profitability (profit before tax/revenue) above 10% are covered[31]. Market jurisdictions will be able to tax 25% of the in-scope profit[32]. As the extractive industry and regulated financial services are excluded and, due to such thresholds, estimations show that fewer than 80 MNEs will be affected[33]. The distribution of the tax base among eligible market jurisdictions is be calculated by reference to revenue source rules that are mainly based on the location of the consumer[34]. The second measure – Amount B – consists of adopting a fixed return on sales to remunerate related parties' baseline marketing and distribution activities to deliver an outcome that approximates results determined in accordance with the arm's length standard[35]. The objective is to gain in simplification by replacing the applicability of transfer pricing rules with fixed margins. These margins would be tailored to the region and industry where in-scope entities operate and the functional intensity that is displayed.

Pillar Two, also known as the GloBE (Global anti-Base Erosion) proposal, aims at achieving minimum taxation of in-scope MNE income through a combination of rules that would allow other countries to tax income that was taxed at an effective tax rate lower than 15%[36]. The most relevant component in this regard is the Income Inclusion Rule that would allow the residence state of the ultimate parent of the MNE to impose a top-up tax on such low taxed income obtained by subsidiaries abroad. An Undertaxed Payments Rule would function as a backstop for those cases in which the Income Inclusion Rule has not secured minimum taxation by limiting the

[29] The first mention of the project occurred in a three page policy note published on 23 January 2019. Barely two and a half years later, namely, on July 1, 2021, 132 countries announced their support to the adoption of a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy. Cfr. OECD *Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note* (2019) and OECD *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy* (2021).

[30] See OECD, *Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, 10 (2021)

[31] *Ibid*.

[32] *Id*., 11.

[33] Devereux, Michael P. and Martin Simmler, 'Who will pay amount A?', (36) *EconPol policy brief* (ifo Institute, 2021).

[34] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*, 126-129 (2020).

[35] *Id.*, 169-170.

[36] See Joachim Englisch and Johannes Becker, 'International effective minimum taxation - the GLOBE proposal' [2019] 11(4) World tax journal 483. See also Stjepan Gadžo and Šime Jozipović, 'International Corporate Tax Regime Post-BEPS: A Regulatory Perspective' [2020] 48(4) Intertax 432.

deductibility of payments or financial expenses at the level of the subsidiaries of the MNE. The ultimate aim of this proposal is to establish a floor for tax competition by curtailing the effects of low effective tax rates in the attraction of MNE investments. The design of these measures is partially based on the GILTI and BEAT regimes adopted in the United States by the Tax Cuts and Jobs Act in 2017[37].

The implications of these new agreements remain unknown. Most of the international tax law research in the future will most likely refer to outcomes associated with the described change of paradigm from the perspective of tax competition, the allocation of taxing rights on business income, or the construction of a new institutional architecture. Still, before addressing the topics for future research in the field, it is important to put in perspective the relevance of these issues in quantitative terms. For instance, the base erosion and profit shifting phenomenon affects between 4% and 10% of corporate income tax, hence BEPS affects between 0.36–0.91% of total tax revenue in OECD countries, or 0.12–0.342% when measured against the GDP[38]. Although such phenomena is not negligible, especially if measured in absolute terms, it must be contrasted with the impact of other more relevant issues – at least from a quantitative perspective – affecting tax revenues. One such concern is the tax gap, i.e., the amount of revenue that should have been collected according to the economy and the configuration of the tax system of a country versus revenue actually collected, which is inferior mainly due to undeclared wealth[39]. With that caveat in mind, in the next section, the foreseeable topics that will occupy research on international tax law will be further depicted.

IV. Topics for future research on international tax law

Research on international tax law will surely continue to take place regarding its usual topics, specifically, the elimination of double taxation, the interpretation and enforcement of tax treaties, transfer pricing regulations, anti-abuse devices, etc. This section does not have a comprehensive purpose but instead aims at identifying some of the most relevant lines of research that will configure international tax law as a research field in the future. The selected topics refer to 1) the expansion or contraction of anti-BEPS rules, 2) tax sovereignty and tax competition after the minimum taxation proposal, 3) taxation of economic rents in market jurisdictions, 4) the formulaic allocation of taxable bases, and 5) exploration of new paths towards multilateralism.

A. Expansion or contraction of anti-BEPS rules?

[37] See G. Charles Beller, 'GILTI: "Made in America" for European Tax. Tax Unilateral Measures and Cooperative Surplus in the International Tax Competititon Game' [2019] 38(3) Virginia Tax Review 271.

[38] Stef van Weeghel, 'Digitalization in a Broader Tax Perspective' [2019] 47(6/7) Intertax 532, 533.

[39] See Konrad Raczkowski and Bogdan Mróz, 'Tax gap in the global economy' [2018] 21(4) Journal of money laundering control 567.

The highly inefficient set of international tax regulations that has existed until very recently has allowed MNEs to achieve low effective tax rates through international tax structures that exploited mismatches, the lack of coordination, and the existence of tax incentive regimes. Yet, as described above, after the 2008 financial crisis and the need to raise the revenue levels on corporate taxes, countries grasped an opportunity to achieve unprecedented coordination levels through the BEPS Project and all of the outcomes that have derived from it.

Notwithstanding, perhaps the reaction has been stronger than necessary. The adoption of anti-BEPS rules has developed to a point that some of them may be redundant or made other existing ones redundant anyway. One of the clearest examples concerns the adoption of the principal purpose test in tax treaties that has flourished vigorously after BEPS as a result of being part of the minimum standard[40]. Is the beneficial ownership concept necessary after the introduction of the PPT? Does it make sense to allow for the applicability of domestic anti-abuse rules in tax treaty contexts when a PPT already plays the same role? Are specific anti-abuse rules present in treaties such as Articles 13.4 or 17.2 OECD MTC really necessary? Additionally, the floor to tax competition that comes with the GloBE may reduce BEPS to a point in which certain profit shifting techniques that were tackled in the BEPS Action Plan are no longer feasible. What are the implications of the GloBE concerning anti-BEPS regulations? Surely these will be answered when the reactions after its adoption – both from the perspective of countries and MNEs – are examined.

Future research should provide a response to the redundancies of anti-BEPS rules and facilitate their elimination them in order to promote simplification directed towards the achievement of more certainty. Perhaps research could even focus on eliminating double taxation caused by such rules[41] or, alternatively, it should identify new lines of action where anti-BEPS rules are actually necessary. For instance, the European Union has announced a proposal to attempt to effectively address shell entities that exceeds the original scope of the BEPS Project. It is aimed at fighting against companies with no or minimal substantial presence and real economic activity[42]. These types of initiatives should be analyzed in terms of proportionality or, more specifically, in terms of their necessity, suitability, and the exploration of other less restrictive means to achieve the intended purpose.

B. Tax sovereignty and tax competition after minimum taxation

The implementation of minimum taxation will not result in the abolition of tax competition but will establish a floor to it that definitely puts an end to the

---

[40] See OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. Action 6: 2015 Final Report* (2015).

[41] See an example regarding hybrid entities on Leopoldo Parada, 'Hybrid Entities and Conflicts of Allocation of Income Within Tax Treaties: Is New Article 1(2) of the OECD Model (Article 3(1) of the MLI) the Best Solution Available?' [2018] (3) British Tax Review 335.

[42] European Commission, *Business Taxation for the 21st Century*, 9 (2021).

"jurisdiction not to tax" of several countries, i.e., the exercise of taxing powers that leave items of income untaxed – or taxed at low rates – in order to attract investment[43]. Specifically, GloBE regulations would allow other countries to impose a top-up tax that would be calculated in accordance with the existing spread between low effective tax rates and the agreed 15% minimum effective tax rate. The long announced single tax principle seems to have prevailed after all, at least within the scope of GloBE[44].

What it is most interesting about the proposal is that it does not even require unanimity. As long as the proposal is implemented in the jurisdictions where the majority of headquarters of MNEs are located – mainly the US, the EU, the UK, China, Japan, Australia, and Canada – the GloBE proposal will succeed. The rest of the world will have to raise their effective tax rates, at least those applicable to subsidiaries of MNEs encompassed by the GloBE rules, because the maintenance of low effective tax rates will be futile as other countries will be able to tax such income. Further research should explore the appropriateness of such an incidence and the content of the concept of sovereignty in international tax law after the GloBE which will be significantly diminished. In this regard, another interesting line of research would consist of the exploration of possible reactions from countries unwilling to forfeit the opportunity to tax in-scope GloBE income, such as a tax that would increase the effective tax rate to 15%, but not more, in order to remain competitive. It would be interesting to see the effects on other alternatives to attract investment, such as subsidies or labor-related measures.

Additionally, the described floor on tax competition will exist but will be irregular, at least, due to two reasons. First, the GloBe applies to MNEs with a turnover of at least €750 million calculated in accordance with the parameters of the country-by-country regulations[45]. Domestic groups are excluded, as well as MNEs with a lower turnover than the established threshold. To what extent will such ring-fencing affect the effectiveness of the GloBE? Moreover, the introduction of the agreed carve out rule will temper the minimum 15% effective tax rate. Specifically, the agreement reached in July 2021 refers to a carve out clause that would exclude an amount of income equivalent to a range of 5% to 8% of the carrying value of tangible assets and payroll. The design and incidence of the carve out in the calculation of the minimum effective tax rate should also be scrutinized by future research on the subject matter. The review of the different components of the GloBE in accordance with a normative assessment – mainly based on the parameter of efficiency – will certainly be featured prominently in future research.

It is interesting to note that the GloBE also eliminates the longstanding discussion on the nature of transactions undertaken to achieve low effective tax rates. Irrespective

[43] See Aitor Navarro, 'Jurisdiction Not to Tax, Tax Sparing Clauses, and the OECD Minimum Taxation (GloBE) Proposal' [2021] 2021(1) Nordic tax journal 6.

[44] See Reuven S. Avi-Yonah, 'International taxation of electronic commerce' [1996] 52 Tax Law Review 507.

[45] See OECD, *Transfer Pricing Documentation and Country-by-Country Reporting. Action 13: 2015 Final Report* (2015)

of whether such outcome was achieved through abusive means, avoidance, aggressive tax planning, legitimate tax planning, or any other label[46], the GloBE will require the imposition of a top-up tax if the tax rate is lower than the agreed minimum. In fact, the GloBE will often result in double taxation to achieve its purpose, an outcome that is essentially contrary to the rationale of the international tax regime as it was conceived for the last one hundred years. Yet, the traditional relevance of double taxation as the most relevant phenomenon to be addressed by international tax law has been significantly diminished by other concerns, mainly those arising from tax competition.

Another interesting line of research refers to tax competition beyond corporate taxation, specifically on individual income taxation. This constitutes the next frontier on tax competition as limits are not – yet – so stringent. In other words, countries have a greater margin of freedom to establish tax incentive regimes in order to attract high net worth individuals or talent that became significantly more mobile due to the digitalization of the economy and the high acceptance and spread of telework after the COVID pandemic[47]. For instance, there are already voices in the EU calling for an extension of the scope of action of the code of conduct group on business taxation to the taxation of individuals[48].

C. Taxation of economic rents in market jurisdictions

The topic of taxation in the market jurisdiction, i.e., where final consumers are located, will likely be very much researched in the future. For more than 100 years, cross-border taxation has taken place where the factors of production were located[49]. Due to their mobility –especially currently within the knowledge-based economy where the main value drivers are intangible assets[50] – taxpayers can reduce their tax burden by strategically locating these factors as they consider appropriate. As the market is an immobile factor – MNEs have no direct influence on the location of consumers – taxation in market jurisdictions results in efficiency gains[51] – as the system becomes less elective. Recently, due to the reformulation of the standards informing the international tax regime, several countries have decided to impose

---

[46] See Félix D. Martínez Laguna, 'Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives: The Dividing Line between Intended and Unintended Double Non-Taxation' [2017] 9(2) World Tax Journal 189.

[47] See Rita de la Feria and Georgia Maffini, 'The impact of digitalisation on personal income taxes' [2021](2) British Tax Review 154. See also Hannelore Niesten, 'Revising the Fiscal and Social Security Landscape of International Teleworkers in the Digital Age' [2021] 49(2) Intertax 120.

[48] EU Tax Observatory, *New Forms of Tax Competition in the European Union: an Empirical Investigation*, 34 (2021).

[49] See Maarten Floris de Wilde, *Sharing the Pie: Taxing Multinationals in a Global Market*, 488 (IBFD, 2017).

[50] See Baruch Lev, *Intangibles: management, measurement and reporting* (Brookings Institution Press, 2001). See also Romero J. S. Tavares, 'Multinational Firm Theory and International Tax Law: Seeking Coherence' [2016] 8(2) World Tax Journal 243.

[51] See Wolfgang Schön, 'One Answer to Why and How to Tax the Digitalized Economy' [2019] 47(12) Intertax 1003.

turnover taxes based on location specific rents. This includes economic rents generated by relatively immobile factors, such as consumers, that go beyond the traditional source-residence paradigm in the allocation of taxing rights within jurisdictions[52]. The paradigmatic example is the adoption of digital service taxes in several European countries or the equalization levy in India, as described above. The appropriateness of these taxes has been very much contested mainly due to claims of ring-fencing and discrimination against US multinationals or the fact that these taxes are disguised income taxes presented as indirect ones just to avoid conflicts with tax treaties[53].

Nevertheless, the taxation of location-specific rents has gained momentum due to Pillar One. Amount A will permit market jurisdictions to tax residual profits – defined by the October 2021 Agreement as those above 10% of the ratio profits before tax / revenue for in-scope MNEs – sourced to the end market jurisdictions where goods or services are used or consumed. Although the detailed rules are yet to be determined, the 2020 Blueprint provides sourcing rules configured for each type of in-scope revenue. For instance, the sourcing of online advertising services based on the real-time location of the viewer is linked to the jurisdiction that is identified primarily through the geolocation of the device of the viewer at the time of display[54].

Although Pillar One may be criticized for its excessively restricted scope, it cannot be neglected that, if implemented, it would create a breach in the existing consensus of entity-based taxation in accordance with notions such as residence, physical presence – through the concept of permanent establishments – and the allocation of taxing rights in accordance with the arm's length standard. These paradigms will be the prevailing ones even if Pillar One is effectively implemented – as the scope of Amount A is very restricted. However, their status as long-standing consensus standards will probably be questioned in the future hence the relevance of future research in the subject matter. It must also be stressed that alternative methods to tax economic rents will have to be explored as the chances for an effective implementation of Pillar One's Amount A are rather minimal. Such a measure must be adopted in a multilateral convention to bar compatibility issues with tax treaties, and the ratification of such an instrument by the US Congress is nearly impossible. As more than half of the in-scope MNEs are US headquartered, the absence of this country from the agreement would imply its failure. The lack of consensus on this matter could again put other solutions in the focus[55] such as the announced EU digital

[52] See Wei Cui and Nigar Hashimzade, 'The Digital Services Tax as a Tax on Location-Specific Rent' (7737) *CESifo Working Paper Series* (2019). See also Shaviro, D. (2019). Digital Services Taxes and the Broader Shift From Determining the Source of Income to Taxing Location-Specific Rents, supra n 55, p. 34.

[53] See Ruth Mason and Leopoldo Parada, 'The Legality of Digital Taxes in Europe' [2020] 40 Virginia Tax Review 175.

[54] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*, 74 (2020).

[55] Plus, the rollback agreements to eliminate digital service taxes concluded by the US with Austria, France, Italy, Spain, and the United Kingdom are conditioned to the implementation of Pillar One. See the text of the agreement at https://home.treasury.gov/news/press-releases/jy0419.

levy[56] that was suspended in order to not interfere with Pillar One negotiations and could be reinitiated by the European Commission as an EU resource to fund the EU budget.

Irrespective of the aforementioned, future research on international tax law should not only focus on such novel ways to tax MNEs' income from the perspective of market jurisdictions. It should additionally address longstanding claims by certain developing countries on the expansion of source taxation, especially regarding the taxation of services and royalties[57]. Despite the configuration of the OECD Model that advocates for exclusive taxation in the residence state, several tax treaties deviate from such formulation to allow the source state to tax a portion of such income[58]. Notwithstanding, there is no uniformity in the existing formulas – expansion of the royalty concept, inclusion of a service PE clause in the definition of the permanent establishment concept, inclusion of an article concerning the taxation of technical services – and new propositions such as source taxation of payments for digital services included in the UN Model Convention[59]. Future research should clarify which option is best under specific circumstances and whether source taxation may be superior – or complementary – to the alternatives in the taxation of the digitalized economy analyzed above[60].

D. Beyond the arm's length standard – formulaic allocation of taxable bases

The requests for the simplification of the allocation of tax bases on business profits have taken place for decades. For transactions between related parties, the arm's length standard requires that the calculation of taxable profits reflects the outcome that independent parties would have agreed on under the same circumstances[61]. The objective of neutrality between related and non-related transactions and accuracy that seeks such a principle can only be attained through a set of fairly complex regulations, namely transfer pricing, aimed at achieving the most accurate result possible. The tradeoff implies high levels of complexity for taxpayers and tax authorities alike.

[56] See the public consultation the European Commission launched on the subject at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-&-competitive-digital-economy-digital-levy_en.

[57] See Adolfo Martín Jiménez, 'BEPS, the Digital (ized) Economy and the Taxation of Services and Royalties' [2018] 46(8/9) Intertax 620.

[58] See an overview in Marta Castelon, *International Taxation of Income from Services Under Double Taxation Conventions: Development, Practice and Policy* (Kluwer Law International BV, 2016).

[59] See UN Committee of Experts on International Cooperation in Tax Matters, *Update of the UN Model Double Taxation Convention between Developed and Developing Countries – Technical changes proposed for the 2021 Update of the UN Model* (2021).

[60] See Andres Báez Moreno and Yariv Brauner, 'Taxing the Digital Economy Post BEPS... Seriously' [2019] 58 Columbia Journal of Transnational Law 121.

[61] On the basics of the arm's length standard and transfer pricing, see Richard S. Collier and Joseph L. Andrus, *Transfer pricing and the arm's length principle after BEPS* (Oxford University Press, 2017). See also Michael Lang and others, *Fundamentals of Transfer Pricing: A Practical Guide* (Kluwer Law International, 2018).

Moreover, transfer pricing is often quoted as one of the main catalyzers for profit shifting by encouraging taxpayers that take their transfer pricing policy seriously to exploit possibilities to establish acceptable prices at each stage of the value chain[62]. Yet, transfer pricing rules have been adopted almost worldwide and are probably the best example of consensus reached in international tax law – both in the pre- and post-BEPS eras. Despite being domestic regulations, transfer pricing has reached a significant level of standardization due to the efforts by the OECD through the publication and promotion of their celebrated transfer pricing guidelines[63].

The OECD, in fact, has traditionally been the strongest proponent of transfer pricing as a consensus solution, and it was not until very recently that they seriously considered to – partially – abandon the arm's length rationale with the launch of the Pillar One proposal. Aside from Pillar One's Amount A – described above – that allocates taxing rights to market jurisdictions following a predetermined formula, the so-called Amount B is also relevant in this respect. It aims to standardize the remuneration of related party distributors that perform baseline marketing and distribution activities. The objective is to enhance certainty and reduce both controversy as well as compliance and administration costs through the establishment of fixed margins on sales to remunerate these activities[64]. It would eliminate the longstanding discussions on the remuneration of limited risk distributors, the allocation of marketing costs and benefits, and similar issues concerning distribution activities. Remuneration would then be calculated as a fixed return on sales to deliver an outcome that approximates results determined in accordance with the arm's length standard. Such a return would vary corresponding to the specific features of the region and industry where in-scope entities operate and the functional intensity that is displayed[65]. Further research should further the expansion of predetermined margins or methods to enhance simplification in transfer pricing, especially for developing countries in which the administration of these regulations is legitimately burdensome due to the lack of sufficient resources that can be dedicated to this field[66].

Aside from the adoption of formulaic solutions in specific areas, there is a significant amount of literature on the adoption of a comprehensive set of rules to apportion corporate income in a formulary fashion[67]. Certain countries have adopted formulary apportionment to allocate income at a subnational level but, thus far, such a solution has not been adopted at a supranational level. The European Union is the

---

[62] J. Clifton Fleming Jr, Robert J. Peroni and Stephen E. Shay, 'Worse than exemption' [2009] 59(1) Emory Law Journal 79, 126.

[63] See Michael Kobetsky, 'The Status of the OECD Transfer Pricing Guidelines in the PostBEPS Dynamic' [2020] 3(2) International Tax Studies 54 p.

[64] *Ibid.*, 160.

[65] *Ibid.*, 169-170.

[66] See Aitor Navarro, 'Simplification in Transfer Pricing: A Plea for the Enactment of Rebuttable Predetermined Margins and Methods within Developing Countries' [2018] 22 Florida Tax Review 755

[67] See an overview of the literature on formulary apportionment versus the arm's length standard at Stefan Greil, 'The Arm's Length Principle in the 21st Century - a Literature Overview' [2021] 6(2) Journal of Tax Administration 148.

only region where proposals have been raised but so far without any success[68]. Notwithstanding, the reform wave impulse by the OECD has created the political momentum for the European Commission to renew the efforts on adopting a EU-wide set of corporate tax rules to allocate profits following formulary apportionment for MNEs operating in the region. The new set of rules, known as Business in Europe: Framework for Income Taxation (BEFIT) aims at establishing a single corporate tax rulebook for the EU based on the key features of a common tax base and the allocation of profits between Member States based on a formula[69]. The search for an efficient design, especially on the allocation key factors – labour, assets, sales – will surely continue to be scrutinized in the future by international tax commentators.

E. Exploring new ways to further multilateralism

Multilateralism has become a relevant phenomenon in international tax law only since recent times[70]. Until a few years ago, its only longstanding manifestation was under the widespread use of the OECD Model Tax Convention and Commentaries to negotiate and conclude bilateral tax treaties and to interpret them. Its enhancement can be traced back to the 2009 restructure of the Global Forum on Transparency and Exchange of Information for Tax Purposes and the 2010 amendment of the Convention on Mutual Administrative Assistance and more significantly with the 2013-2015 BEPS Project. This endeavor resulted in the creation of the Inclusive Framework, a forum formed by 140 jurisdictions that have committed to implementing the minimum standard and comprising measures for the fight against harmful tax competition, tax treaty abuse, country-by-country reporting, and dispute resolution matters[71]. Although the minimum standard entails a soft commitment, the adoption of peer-review reports on the implementation of these measures have proven to be highly effective[72]. Additionally, the Multilateral Convention to implement tax treaty related measures to prevent BEPS, signed by 96 countries[73], is another example of the development of multilateralism in international tax law[74].

Coordination has rapidly progressed in the international tax arena since BEPS – both regarding the adoption of substantive and formal rules – and is now at its peak with the political support of the two-pillar solution to tax the digitalized economy

[68] On the topic of formulary apportionment in the EU, see Stefan Mayer, *Formulary apportionment for the internal market* (IBFD, 2009).

[69] European Commission, *Business Taxation for the 21st Century*, 11-12 (2021).

[70] See an overview in Wolfgang Schön, 'Is There Finally an International Tax System?' [2021] 13(3) World Tax Journal 357.

[71] See OECD, *OECD/G20 Base Erosion and Profit Shifting Project 2015 Final Reports. Executive Summaries* (2015).

[72] The peer review reports are fully accessible on the internet and may be found at https://www.oecd.org/tax/beps/beps-actions/.

[73] See the signatories at https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

[74] Yet, it must be stated that the aim of the Multilateral Convention is to update bilateral tax treaties and thus does not have a multilateral character as such. See Yariv Brauner, 'McBEPS: The MLI - The First Multilateral Tax Treaty that Has Never Been' [2018] 46(1) Intertax 6.

and expansion of the Global Forum. It is still unclear whether such consensus will be successful and, more importantly for this subsection, whether it will lead to the establishment of supranational institutions to administer and perhaps even contribute to enacting and enforcing future new agreements[75].

However, these developments have generated legitimacy issues. The main supranational player is still the OECD which is an institution that gathers the developed nations of the world. Despite progress in the way it operates as a norm proposer in international tax law – especially so since the creation of the Inclusive Framework – concerns have been voiced, especially on the role that developing countries may have in this regard[76]. Thus far, the most relevant institutions opining these concerns have been the UN mainly through their work on a UN Model Tax Convention and Commentaries and their transfer pricing recommendations[77] and the Platform for Collaboration on Tax which is a joint venture between the OECD, the UN, the International Monetary Fund, and the World Bank Group[78]. Further research should explore paths to more effectively integrate the views and concerns of these countries to guarantee the sustainability of the agreements achieved in the field[79].

https://doi.org/10.4337/9781800885844.00015

[75] See Richard Vann, 'International Tax Policy and International Tax Institutions: Never the Twain?' in G. Maisto (ed.), *Current Tax Treaty Issues: 50th Anniversary of the International Tax Group* (IBFD 2020).

[76] See Martin Hearson, *Imposing Standards: The North-South Dimension to Global Tax Politics* (Cornell University Press, 2021).

[77] See, respectively, UN, *Model Double Taxation Convention between Developed and Developing Countries* (2017) and UN, *Practical Manual on Transfer Pricing* (2021).

[78] See more information about this initiative – and access to their reports – at http://www.tax-platform.org.

[79] On the topic, see Ivan Ozai, 'Institutional and Structural Legitimacy Deficits in the International Tax Regime' [2020] 12(1) World Tax Journal 53.