3. Taxing migrants more fairly in an era of globalization

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INTRODUCTION

The current age of the global economy can be distinguished from the previous one (following the First World War) by the increasing mobility of human capital which, in our view, calls for revisiting the international tax rules that were shaped and developed over a century ago. Following the end of the First World War, developed countries placed extensive restrictions on cross-border migration (after a long period of approximately six decades in which cross-border movement of individuals was relatively free), which made the movement of individuals between countries relatively difficult. As a result, throughout most of the 20th century, human capital mobility was considered relatively static, while at the same time, during the second half of the 20th century, financial capital became more mobile than ever before.[2]

In the last two decades, mainly thanks to significant technological advancement and communication breakthroughs, both high- and low-income countries realized the importance of cross-border migration in boosting economic growth and, not surprisingly, many countries revisited their migration policies such that cross-border migration has reached unprecedented levels (the number of cross-border migrants has more than tripled since the 1970s), and the number of cross-border migrants continues to grow rapidly.[3] Even though,

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[1] The authors would like to thank Reuven Avi-Yonah, Yvette Lind, Yariv Brauner, and the participants at the workshop on the interlinking between taxation, citizenship, and democracy for their comments and assistance.

[2] Reuven S. Avi-Yonah, *Globalization, Tax Competition and the Fiscal Crisis of the Welfare State*, 113 Harv L. Rev. 1575 (2000); Leveraging Economic Migration for Development a Briefing for the World Bank Board 23 (World Bank, 2019).

[3] Catherine Wihtol de Wenden, *New Migrations – Why are more people on the move than ever before – and where they are going?* 13 Int'l J. on Human Rights 17, 18 (2016).

for the time being, the overwhelming majority of the world's population still resides within one's country of birth (the percentage of cross-border migrants equates to approximately 4% of the world's population), cross-border migrants' economic impacts, which is estimated at hundreds of billions US dollars a year, significantly outweighs the migrants' representation in the global population and requires revisiting the rules that govern the taxation of cross-border migrants and the rules that allocate the taxing rights among the taxing jurisdictions that have a legitimate claim to tax such cross-border income and gains.[4]

Over the past 50 years, tax literature has mainly focused on migration of the most trained, educated, talented or wealthy individuals, mainly from low-income countries to high-income countries (i.e., brain drain),[5] even though it represented less than half of the cross-border migration phenomenon,[6] and neglected to address several migratory trends that became popular, including digital nomadism, the extension of international tourism (according to which individual members of high-income countries move and live in low-income countries to enjoy comparative advantages of lower cost of living and better climate conditions), and displaced persons that are required to leave due to significant disasters (political prosecution, wars, pandemic, climate changes and more).[7]

Our chapter will address the tax implications and challenges that arise from the increasing mobility of human capital and propose a novel set of rules that would tax cross-border migrants and allocate taxing rights among the countries of origin and countries of destination more fairly. Section 1 of this chapter provides a general overview of the increasing cross-border mobility of individuals over the last several decades, explores the different motives for such migratory phenomenon and the economic impact it has on billions of migrants and their loved ones who stayed behind. Section 2 touches upon the origins of the current international tax rules and principles. Section 3 examines the rules that determine fiscal residency of individuals for income tax purposes among the OECD member states, and the rules that have been developed almost a century ago and shaped tens of national income tax systems as they exist

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4 Wihtol de Wenden, *ibid*, at 18–20.

5 For a review of the literature that presented and analyzed the brain drain phenomenon see Yariv Brauner, *Mobility of Individuals, the Brain Drain, and Taxation in the Digital Age*, Draft (July 2022); Yariv Brauner, *Brain Drain Taxation as Development Policy*, 55 St. Louis U. L. J. 221 (2010).

6 World Bank Group, *Leveraging Economic Migration for Development: A Briefing for the World Bank Board*, 20 (World Bank Group 2019).

7 World Bank Group, *ibid* 5, at pp. 8–11.

today. These rules have remained almost intact throughout the last century, despite significant changes that affected our reality, the way we live and perform our labor duties. Section 4 revisits theories of social membership in the context of increasing cross-border migration and examines the replacement of a binary residency concept, Bhagwati's tax proposal, and recent tax regimes offered by countries that wish to attract migrants in a race to the bottom, and it ends with the idea of replacing the binary approach in determining residency for individual taxpayers. Section 5 presents the new regulatory framework for determining fiscal residency of individual taxpayers that would strengthen the existing rules that, we believe, can be manipulated by well-off sophisticated taxpayers in their favor regressively.

This chapter therefore focuses on the necessary measures to be addressed by national tax systems. We also call for the reexamination of the tax treaty network and are aware that additional measures should be developed within the current tax treaty network, including the adoption of a multilateral treaty, or modifying the recent adopted treaty; however, such measures exceed the scope of this chapter.

1. INCREASING MOBILITY (DOMESTICALLY AND CROSS-BORDER) OF HUMAN CAPITAL

There are approximately 1 billion migrants in the world, which represents approximately one seventh of the global population.[8] Between a quarter and a third of this migrant population are cross-border migrants, even though it accounts for roughly less than 4% of the world's population. However, this relatively minor percentage is misleading, as their economic contribution in countries of origin as well as in countries of destination is apparent and significantly outweighs their percentage in the global population.[9]

Based on different economic estimations, cross-border migrants' annual economic impact is colossal and is estimated at hundreds of billions of dollars.[10] This multibillion-dollar economy impacts the countries which host these migrants as well as the economies of the countries of origin. These

[8] World Health Organization, *Refuge and Migrant Health*, (last visited 29/02/2024), https://www.who.int/health-topics/refugee-and-migrant-health#tab=tab_1.

[9] International Organization for Migration, *World Migration Report 2022*, (last visited 30/09/2023), https:// publications .iom .int/ books/ world -migration -report-2022.

[10] This estimate is based on the result of multiplying the average salaries in the developed countries and the number of migrant workers, and including the amounts remitted by migrants to their friends and families.

migrants remit hundreds of billions of dollars annually (approximately $700 billion in 2022 of cross-border remittance) to their loved ones who were left behind in addition to other payments they make before they migrate and during the period in which they work overseas. This continues until they return or acquire long-term or permanent status as residents or citizens in the countries of destination.[11]

Based on the 2019 Economic Migration Report, migration flows are expected to increase in the coming years primarily due to demographic pressures and income differences (i.e., during 2013–17, the average income in the high-income OECD countries was $43,083, compared with $795 in the low-income countries, and the economic growth rate continues to rise, so it is expected to take more than a hundred years to close such income gaps). However, it should be emphasized that the high-income countries did not loosen their migration policies solely for philanthropic reasons, and they monetize their migration policies in their favor and benefit from migration through increased supplies of labor, skills, innovation, and entrepreneurship in addition to the taxes and social contribution they pay. The 2019 Economic Report also refers to a study that examined the economic impact of cross-border migrants in the 22 richest OECD countries and found that approximately 83% of the native-born population in these countries have experienced a welfare gain because of immigration from non-OECD countries.[12]

In contrast, the demographic statistics in low- and medium-income countries expect that if the current demographic growth rate is unchanged, migration pressures are likely to rise, as by 2030, the growing pool of working-age population (15–64 years) in such countries is expected to grow by 552 million, and such countries will not be able to produce sufficient jobs to for their growing population, inevitably resulting in increased unemployment and poverty.[13]

2. THE FOUNDATIONS OF THE INTERNATIONAL INCOME TAX SYSTEM

Modern income tax systems were formed by countries during the second half of the 19th century and the first half of the 20th century. Hence, it should not come as a surprise that the first attempt to allocate taxing rights among countries is traced to that period and was achieved via tax treaties between two or more countries. Such an attempt was made even though the volume of

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11 World Bank Group, *supra* note 6, at 15.
12 World Bank Group, *ibid*, at 12.
13 World Bank Group, *ibid*, at 13.

cross-border international trade was relatively modest (ignoring the international trade among different colonies within the British Empire).[14]

The first comprehensive attempt to coordinate allocation of taxing rights among countries in the cross-border setting was made by the League of Nations, which appointed a committee of four renowned economists representing four different countries (the United Kingdom, Italy, the Netherlands, and the United States) to propose a set of rules that would allocate the taxing rights in cross-border transactions. The committee presented its report in 1923, which offered a compromise between capital importing countries and capital exporting countries, according to which there are two bases on which countries may exercise jurisdiction to tax income or gains generated in cross-border economic activities: "source," which refers to the country that hosted the economic activity, and taxpayer's "political allegiance," which refers to the country in which the taxpayer generating such income or gain is its member (also referred to as the residence country).[15]

Accordingly, due to such compromise, there are at least two distinct countries (residence country and source country) that have legitimate claims to impose taxation on such cross-border income or gain, and since such two grounds (which in many cases means multiple claims) to tax cross-border income might lead to double-taxation, the Economists Committee proposed to prioritize the source country over the residence country. Consequently, such prioritization means de facto that the source country's gains in tax revenues is possibly the residence country's loss (in an analogy to game theory literature, which considers it as a zero-sum game), as the residence countries are expected to allow foreign tax credit, which would reduce their tax claims.

The 1923 Economists Committee justified the legitimacy of the source country claim to the income produced within its borders that the taxpayer (whether a member of that country for tax purposes or not) should contribute to the costs of services provided by the host government, including, for example, the costs of infrastructure (including roads, electricity, communication, etc.), police and fire protection, economic stability, the system for enforcement of laws, and so on.[16] In determining the place from which the "active income"

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14 Peter Hongler, International Law of Taxation, 7–10 (2021); *see also* Doron Narotzki, *Tax Treaty Models – Past, Present, and a Suggested Future*, 50 Akron L. Rev 383, 386–390 (2017).

15 Reuven S Avi-Yonah, *The 1923 Report and the International Tax Revolution* (2023) available https://ssrn.com/abstract=4365398.

16 Hugh J. Ault, & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises,* 11 Taxation in the Global Economy 30–31 (1990); Michael J. Graetz, *Taxing International Income – Inadequate Principles, Outdated Concepts, and Unsatisfactory Policy*" 54 Tax L. Rev. 61

originated, the committee gave special emphasis to the physical location that hosts the economic activity which generated the income.[17] The idea behind the "principle of origin" was explained as an attempt to trace the location in which the intellectual element is to be found.[18] The idea that the residence country has a fair claim to tax income produced by its members outside its borders is twofold: first, it is justified to tax foreign source income where the consumption occurs, and second, the government finances goods and services for the use of its members whether they exercise their rights and consume it or not but can freely decide to exercise their rights to do so.[19]

The decision to prioritize the country of source in allocating taxing rights over the residence country (meaning that the geographical nexus would be more significant than the personal nexus the taxpayer has with the country in which they are its member) may have been justifiable a century ago, when most individual taxpayers spent their entire life in the same country and mainly invested their fortune domestically. However, as human capital mobility increased and, no less important, as the ability to perform commercial duties (whether as an employee or as a service provider) depends mainly on the taxpayer's subjective decision and hardly at all on specific geographical location, it is unclear to what extent the existing source rules were developed to capture professional service income a century ago (generally *place of performance* rule) properly capture the location from which the intellectual element of such labor originates.

Furthermore, over the years more countries developed the following two sets of rules that established *territorial* jurisdiction and personal jurisdiction to tax cross-border income and gains: the source country requires reporting and imposes taxes only on income or gain that arises within its territory, whereas

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(2001); Reuven Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 Texas L. Rev. 1301 (1996); Yariv Brauner, *An International Tax Regime in Crystallization-Realities, Experiences and Opportunities*, 56 Tax L. Rev. 259 (2003).

[17] The committee adopted a different rule for determining the place of origination of passive income. The origination of passive income was determined as the residence country of the payer, and for real estate income as the country in which the real estate is located. The League of Nation Economic Report, *United Nations office at Geneva* (The League of Nations, 1923).

[18] Eric C.C.M. Kemmeren, *Legal and Economic Principles Support an Origin and Import Neutrality-Based over a Residence and Export Neutrality-Based Tax Treaty Policy* in Michael Lang *et al*. (eds), *Tax Treaties: Building Bridges Between Law and Economics* 309 (IBFD, 2010).

[19] Reuven S. Avi-Yonah, *The Structure of International Taxation: A Proposal for Simplification*, 74 Texas L. Rev. 1301, 1311–1312 (1996).

the residence country exercises in *personam* authority over the taxpayer and obligates its members to aggregate and report their entire income and gain from all sources (also referred to as a worldwide basis).[20] However, while the residence countries tax domestic source income fully, foreign source income or gain will only be taxed by the residence country if the foreign taxes paid on such foreign source income does not exceed the domestic tax liability imposed under the residence country.[21]

In particular, international tax rules were developed a century ago to tax labor income (including income from employment and rendering services), in a distinct economic and demographic reality, and assumed that such labor income originates in taxing jurisdictions that are responsible for the income production process, and awarded the countries from which the labor duties were performed (place of performance rule) a preference in exercising its taxing rights over the allocable income that was generated in that country. However, to simplify the allocation of taxing rights among countries, a minimal economic threshold was set based on the length of the physical presence of the employee. As such, an employee who resided less than 183 days in a certain country would not be taxable in that country, leaving the residence country the sole right to exercise its taxing rights over such income that has been performed outside that country.[22]

Similarly, article 4 of all model tax conventions adopts a binary concept. This means that even though an individual taxpayer may have economic and physical affinity to more than a single taxing jurisdiction and can be regarded under several national countries' tax regimes as their fiscal resident, the treaty network decided that for purposes of allocating taxing rights on personal basis, an individual taxpayer may be viewed as having solely a single fiscal residency. The fiscal residency selection process is based on certain criteria that are referred to as tiebreaker rules. However, we argue that it is not entirely clear to what extent such criteria (tiebreaker rules) are meaningfully determinative in the 21st century and whether such a binary concept is indeed sensible and necessary. Also, while the bilateral tax treaty network does not provide treaty protection to taxpayers who are not taxed on a worldwide basis, it lacks an explicit reference that denounces statelessness status. Furthermore, under

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[20] Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 Iowa Law Review 1289, 1294 (2011).

[21] Edward A. Zelinsky, *ibid* at 1295–1296; Reuven S. Avi-Yonah, the Single Tax Principle (2022) available at https://ssrn.com/abstract=4121180.

[22] Article 15(2)(a) of the OECD, U.S. and U.N. Model Tax Conventions. See Wolters Kluwer, *Klaus Vogel On Double Taxation Conventions*, Vol II. 1089 (Ekkehart Reimer and Alexander Rust, 4th ed. 2015).

the existing international tax rules, fiscal residency is determined each year separately, which means that to a certain extent such determination disregards the taxpayer's personal connection to a different taxing jurisdiction in previous years, which in our view could lead to taxpayer manipulation and could also result in arbitrary results.[23]

To understand how mobility of individuals has made the fiscal residency determination decision overly challenging, consider the following example. Catherine was born in New Zealand and moved with her parents to Canada when she was one year old. The family settled in Canada, and when she graduated high school, she decided to spend some time in Europe before she started her medical studies. During her time in Europe, she fell in love in France with Malte, who was born in Germany and lived most of his life in Austria. They got married, and Catherine was accepted to medical school in Paris. Catherine received a full stipend, which also covered her cost of living. When she finished her medical studies, she started to work as a physician in Italy with Malte. After a decade of wonderful marriage during which they had two kids, the couple decided to divorce. And after her divorce Catherine moved to the UK, when she was asked to manage a brain surgery department in Australia.

Catherine is a worldwide leading brain surgeon in her field. She resides fifty (50) days a year in Australia and travels a lot, spending not more than thirty (30) days in any specific location, and she lives in hotels. Most of the surgeries she is carrying out are done remotely using special robots that allow her to operate on patients without even seeing them in person (also referred to as telesurgeries). Her kids are studying in private boarding schools in the United States.[24] Catherine acquired a beautiful house in Thailand, where she spends her annual one-month family vacation with her kids.

This example may indeed sound familiar from one of your popular TV series. Clearly, the increasing mobility of human capital, and the introduction of technological and communication breakthroughs, have not only changed the significance of the territorial nexus between the income production process (the place in which the labor duties are performed) but have also impacted the sentence "one person one country" as migration barriers are removed or greatly loosened, and more and more countries wish to attract taxpayers such as Catherine and many others. While Catherine renders her medical services

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[23] Wolters Kluwer, *Klaus Vogel On Double Taxation Conventions*, Vol. I 269 (Ekkehart Reimer and Alexander Rust, 5th ed. 2022).

[24] Michael S. Kirsch, *The Role of Physical Presence in the Taxation of Cross-Border Personal Services*, 51 Boston College Law Review 993, 996 (2010); Michael S. Kirsch, *Tax Treaties and the Taxation of Services in the Absence of Physical Presence*, 41 Brook. J. of Intl Law 1143, 1144 (2016).

in many distinct locations remotely, it is not entirely clear whether any of the source countries are entitled to exercise their taxing rights, and to the extent they are, whether they waive it partially or fully altogether.

Furthermore, the increasing cross-border mobility of Catherine in this example is also partly due to significant improvements in transportation becoming more reliable, faster and affordable, which undermines, to a certain extent, the significance or contribution of the source country to the income-generation processes, as more and more duties can be performed remotely, by using one's laptop from anywhere. And in such circumstances, attributing the taxing rights to the source country is unjustifiable (in full or in part).[25]

Similarly, Catherine resides on average not more than a month in any location, in each location she stays in hotels, and her single house is in Thailand, where she only goes on vacation once a year. She may have several citizenships or is only a citizen of New Zealand, her kids go to private boarding schools. Under these circumstances it is not entirely clear under the existing international tax regime to which of the different taxing jurisdictions Catherine's social, familial, and economic relations are closer such that she would be regarded as its fiscal member, and whether Catherine could under such circumstances be regarded fiscally stateless or if she could just randomly decide to be regarded tax resident in a taxing jurisdiction at her convenience.[26]

The rising tax electivity of individual taxpayers in the last several decades has become more acute as tens of countries adopted citizenship/immigration investment programs that offer foreigners citizenship/permanent residence status along with favorable tax treatment to attract the educated, well-off and entrepreneurs, as we will elaborate on more in section 4 of this chapter.[27]

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[25] Svetislav V. Kostić, *International Taxation and Migrations*, Chapter Research handbook on international taxation 353, 360 (Yariv Brauner, 2020) presents data from the U.S. Bureau of Labor Statistics and the U.S. Department of Labor which shows that over the past century in the United States approximately 25% of employed people did some or all of their work remotely, whereas more than 35% of people in management, business, and financial operations, and of people in professional and related occupations did some or all of their work remotely; *see also* Mari Sako, *From Remote Work to Working from Anywhere*, 64 Communication of the ACM 20–21 (2021).

[26] For a discussion on the relations between political rights, welfare support and tax liability see Yvette Lind, *Voting Rights Compared to Income Taxation and Welfare Benefits Through the Swedish Lens* 23 Fla Tax Rev. 713 (2020).

[27] The 2015 International Monetary Fund Working Paper lists: Antigua and Barbuda, Cyprus, Dominica, Grenada, Malta, St. Kitts and Nevis, Australia, Bulgaria, Canada, France, Greece, Hungary, Ireland, Latvia, New Zealand, Portugal, Singapore, Spain, United Kingdom, and the United States as jurisdictions

3. TAX RESIDENCY DETERMINATION AMONG THE OECD NATIONAL TAX SYSTEMS

Individuals' fiscal residency for tax purposes is defined pursuant to each country's tax system, and there is no acceptable universal definition that achieves multilateral consensus. The common denominator of the different definitions is that each taxing jurisdiction attempts to establish attachment (such as familial, social, or economic connections) that justifies that taxing jurisdiction's right to tax based on personal jurisdiction. Generally, the personal connection between the taxpayer and the taxing jurisdiction is examined for each taxable period (generally every calendar year) separately based on connecting factors that existed during that period and to a certain extent regardless of the taxpayer's attachment to other taxing jurisdictions in previous years.[28]

The methodology that examines fiscal residency based on criteria that existed during the relevant taxable year regardless of existence of connecting factors in previous years is not free from doubt, in our view, since most tax systems do not tax appreciation of "human capital" currently (such concern is also sometimes referred to as risks of brain drain losses). Even the taxing jurisdictions that adopt "exit taxes" or "expatriation taxes" mainly focus on taxation of unrealized appreciation of tangible and intangible property just immediately before the taxpayers change their residency, and this may result in brain drain losses for the countries whose residents departed, abandoned their tax residency, and acquired a novel tax residency in the country of destination.[29]

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offering their citizenship and/or residency in return for investment. International Monetary Fund Working Paper No. WP/15/93, at 5, available at https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Too-Much-of-aGood-Thing-Prudent-Management-of-Inflows-under-Economic-Citizenship-Programs-42884. See also Allison Christians, Buying in: Residence and Citizenship by Investment 62 St. Louis ULJ 51 (2017). However, an updated list of countries and the requirements to acquire citizenship or permanent residency status is reviewed in three distinct studies conducted by Professor Leila Adim and Professor Allison Christians. Leila Adim, "*Between Benefit and Abuse: Immigrant Investment Programs*", 62 St. Louis ULJ 121 (2017); Leila Adim, "*Residence and Citizenship by Investment: an updated database on Immigrant Investor Programs* (2021) (September 1, 2021). Available at SSRN: https://ssrn.com/abstract=3914350; and Allison Christians, Buying in: Residence and Citizenship by Investment 62 St. Louis ULJ 51 (2017).

[28] Wolters Kluwer, *supra* note 23, at 301–303; Reuven S. Avi-Yonah, *Taxing Nomads: Reviving Citizenship-Based Taxation for the 21st Century* (working paper 2022); Kostić, *supra* note 25, at 361–362.

[29] *See* Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013); Tamir Shanan & Doron Narotzki, *Reevaluating the Allocation of Tax*

To better understand the concern of brain drain losses, assume an individual is born in a country which invests a significant amount of money in welfare, healthcare and education. The individual finishes high school and obtains an academic degree in publicly funded educational institutions and, before they start working and getting compensated and paying income taxes, they migrate to a different country.

The following list of connecting factors represents a non-exhaustive criterion that OECD member states adopted in determining fiscal residency of individuals for tax purposes in their domestic tax system: physical presence during the relevant taxable period (and some even examined physical presence of the taxpayer during a longer period), familial and social personal connections between the taxpayer and her family with the taxing jurisdiction, center of financial interests (such as investment activities, principal place of abode, personal permanent or customary residence (owned or leased) that is available for the taxpayer and her family), registration at civil registry, registration of permanent address in municipality, nationality (including citizenship, domiciliary or long-term permanent residency status), state public servant status, or employment relationship.[30] Accordingly, many income tax systems around the world defined the connecting factors that establish personal jurisdiction under the assumption that a taxpayer acquires or rents a permanent home, gets married and procreates and establishes a nuclear family with a spouse and children. However, over the past century, demographic statistics reveal that basing the fiscal residency on family circumstances' attachment to a particular taxing jurisdiction gets more and more challenging, especially for people in their twenties, thirties and even in their forties.[31]

> [Unfortunately] some sort of a permanent dwelling and that they will be as a rule endowed with families is that it no longer reflects the reality of the world in which we live in. For example, population statistics not only in Europe, but in most of the

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Collection of Immigrants Between Home Country and Host Country, in Fairness in International Taxation (editors Ira Lindsay and Matthew Benita Rose, Hart Publishing, forthcoming 2023); Douglas Bamford, *Duties in an International World: The Importance of Past Residence and Citizenship*, 1 Problema. Anuario De Filosofía Y Teoría Del Derecho 17 (2023).

[30] Wolters Kluwer, *supra* note 23, at 301–304.

[31] For some statistics of certain demographic changes, see Kostić, *supra* note 25: "For example, in the USA more than 40% of all children are born out of wedlock, while 32% of children live with one parent. Comparatively, 19% of children in France, Netherlands and Spain live with only one parent, 25% in Sweden, and 33% in the United Kingdom. In Italy this percentage is quite low and similar to the one in India, 6% and 5% respectively."

> developed countries in the world show that on average individuals start procreating and entering family life on their own almost a decade after they have entered the workforce. In other words, for most individuals we will not be able to rely on family circumstances in order to determine their attachment to a particular jurisdiction well into their 30s. Furthermore, in a growing number of situations procreation itself is no longer connected with the establishment of a nuclear family.[32]

Among the multiple connecting factors used by the different countries and by the bilateral treaty network, it seems that the two most common factors used by most countries are the taxpayer's physical presence during the calendar year, and the legal term of art, "center of vital interest."[33]

The first criterion that focuses on physical presence generally requires a minimal stay of six months (183 days) during the relevant taxable period. However, as cross-border transportation becomes more reliable, fast, and affordable, human capital mobility increases and, with that, the ability to move from one place to another more easily. Therefore, in our view, it is not entirely clear whether the popular physical presence connecting factor is still meaningful and whether, due to flexible migratory policies and improvement in transportation, the 183 days (six months) presence threshold does not assist taxpayers in avoiding being regarded as resident simply by avoiding the necessary period and allows sophisticated taxpayers to become stateless taxpayers for tax purposes altogether.[34]

The other popular connecting factor among OECD member states in defining fiscal residency for individuals is the personal and economic attachment criterion, which weighs various personal and economic factors that presumably connect the taxpayer to a particular taxing jurisdiction. The center of living connecting factor is more complex (as there are many connecting factors) and less conclusive, as they are highly subjective and force making factually intensive inquiries, which is time-consuming and may lead to different outcomes by different taxing jurisdictions, which may lead to multiple residencies and to double taxation.[35] Nevertheless, the existing bilateral network treaty also adopted this criterion as the principal criterion (following the habitual abode

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32 Svetislav V. Kostić, *supra* note 25 at 360.

33 Another important connecting factor is the availability of a permanent residence/home. Unfortunately, this factor may not be less manipulative, as well-off individual taxpayers may afford acquiring or simply renting a permanent home to acquire fiscal residency in a low-tax jurisdiction and reduce their overall tax liability.

34 Wolters Kluwer, *supra* note 23, at 302–304; Kostić, *supra* note 25, at 361–364.

35 Wolters Kluwer, *ibid,* at 298–310.

criterion which, as we indicated earlier, might have been more meaningful decades ago and is less relevant to hundreds of millions of people in their twenties, thirties and forties), to determine fiscal residency of an individual taxpayer.

Thus, we call to reexamine the following principal concepts that govern that residency determination process under the existing international tax rules: first, we call to replace the binary residency concept with a non-binary approach that would acknowledge that, in our economic reality, taxpayers may indeed have meaningful attachment to more than a single country; second, we call to shorten the economic threshold/physical presence period that is currently set as 183 days to establish residency for tax purposes to a period of 30 to 60 days; and third, we call to adopt rules that would eliminate double taxation based on personal jurisdiction, on one hand, and eliminate double non-taxation rules, including eliminating the ability to be regarded stateless, on the other hand, as we will elaborate on more in section 5 of this chapter.

4. REEXAMINING THE SOCIAL CONTRACT AND SOCIAL MEMBERSHIP

4.1 Departing from the Binary Fiscal Residence Concept

The need to amend the existing tax rules that govern the allocation of taxing rights of labor income in cross-border transactions was raised by Professor David Elkins, who proposed a scalar conception of tax residence for individuals. This considers the strength of an individual's connection to a particular country over time rather than a binary distinction between resident and non-resident based on a single year's presence.[36] This scalar approach would allow for a more nuanced determination of tax residence that better reflects the reality of modern global mobility.

Similarly, Professor Yvette Lind reviewed the connection between the countries in which individuals have political rights (including the right to vote, but no less important is the right to work) and the countries that provide their individuals' welfare security (including medical and welfare coverage), and called to connect such rights with the jurisdiction of these countries to impose taxation based on personal jurisdiction and establishing fiscal residency there.[37]

A slightly different focus on the connection between individuals and the country in which they are resident was raised by Professor Carnes, Professor

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[36] David Elkins, *A Scalar Conception of Tax Residence for Individuals*, 41 Va. Tax Rev. 149 (2021).

[37] Yvette Lind, *supra* note 26 at 728–736.

Bamford and Professors Narotzki and Shanan, who advance the philosophical writing of Jean-Jacques Rousseau from 1762 on the "social contract"[38] and reexamine the concept of "social membership" for tax income purposes and, in analyzing such membership connections, go beyond the connections that existed during the taxable year.[39]

The common denominator of these proposals views the strength of an individual's connection to a particular country over time based on the intensity of their association with that country, while considering factors such as the political rights, welfare coverage, physical presence in a particular country, economic, social, and personal affiliations to the country, and any additional meaningful attachment.[40]

This non-binary approach to tax residence would replace the current binary distinction between resident and non-resident based on a single year's presence. Such a change would reduce the motivation to artificially acquire or abandon residence in more favorable taxing jurisdictions, it would significantly reduce the statelessness status and lessen the race-to-the-bottom competition between countries, and would acknowledge that, in the 21st century, more and more individual taxpayers have meaningful attachment to more than a single country and that allocating taxing rights to more than a single country is fairer.

4.2 The Bhagwati Tax Proposal

Almost five decades ago, Professor Jagdish Bhagwati revisited the allocation of taxing rights between the country of origin and the country of destination focusing on highly skilled/educated individuals migrants in the context of migration from low-income countries to high-income countries (also referred to as brain drain).[41]

Professor Bhagwati's foundational argument was that skilled migrants typically earn economic rents that rely on know-how, which they acquired in their country of origin (including public funding of healthcare, welfare, and

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[38] Jean-Jacques Rousseau's 1762 Treatise on Social Contract (1762).

[39] Joseph Carens, The Ethics of Immigration (Oxford University Press 2013); Douglas Bamford, "*Duties in an International World: The Importance of Past Residence and Citizenship*" 17 *Problema. Anuario de Filosofía y Teoría del Derecho* 143 (2022); Tamir Shanan & Doron Narotzki, *supra* note 29.

[40] David Elkins, *supra* note 36, at 174–76; Yvette Lind, *supra* note 26; Joseph Carens, *ibid*.

[41] For a review of the literature that presented and analyzed the brain drain phenomenon, see Yariv Brauner, *Mobility of Individuals, the Brain Drain, and Taxation in the Digital Age*, Draft (July 2022); Yariv Brauner, *Brain Drain Taxation as Development Policy*, 55 St. Louis U. L. J. 221, 227 (2010).

education). However, since residency for tax purposes is determined for each year separately and these migrants perform their labor duties in the country of destination, under the existing rules, the origin country is unable to tax its former member and ends up in a brain loss, whereas the country of destination that had not invested any resources receives a windfall (brain gain) of skilled professional.[42]

Bhagwati's surtax proposal focused solely on migration from developing countries to developed countries to promote global fairness and basically proposed imposing a tax on the earnings of professionals, technicians, and kindred persons who emigrate from developing countries to developed countries. The surtax would be collected by the country of destination and remitted to the country of origin to compensate for the loss of skilled labor and to fund development projects. However, despite its appeal, the proposal had minimal impact in the way cross-border migration is taxed.[43]

Over the years, the literature surrounding cross-border migration suggested that the countries of origin do not solely incur brain losses and that there may also be brain gains, which include among other things the increased motivation to acquire education among members in the host country to be able to migrate overseas. Another advantage is cross-border remittance made by a former member who migrated and supported the loved ones they left behind.

Different studies show that a significant portion of foreign direct investments are made by a former member who migrated, not to mention the contribution of people who migrated overseas and decided to return with the additional skills they acquired overseas, including the business's network. Hence, it is relatively difficult to conclude if the overall net effects of the cross-border migration are necessarily negative to the country of origin,[44] but nevertheless still justifies the legitimacy of the country of origin to be awarded taxing rights at least for a certain period.

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[42] Jagdish N. Bhagwati and Koichi Hamada, *The Brain Drain, International Integration of Markets for Professionals and Unemployment: A Theoretical Analysis,* 1 J. Dev. Econ. 19 (1974).

[43] Jagdish N. Bhagwati and Koichi Hamada, *Domestic Distortions, Imperfect Information and The Brain Drain*, 2 J. Dev. Econ. 265 (1975); See also Oliver Oldman & Richard Pomp, *The Brain Drain: A Tax Analysis of the Bhagwati Proposal*, 3 World Dev. 751 (1975).

[44] Tamir Shanan & Doron Narotzki, *supra* note 29.

4.2.1 Alarming fragmentation – non-domicile and other favorable tax regimes

More than two decades ago, Professor Reuven Avi-Yonah recognized an alarming phenomenon that resulted from the increased capital mobility and the relaxation of capital exchange controls, which led to a fierce tax competition among sovereign countries to attract investments that threatened to undermine their tax revenues, which traditionally have been the main source of funds that supported modern welfare states. The response of these countries has been, first, to shift the tax burden from (mobile) physical capital to (less mobile) human capital; however, over the past two decades, thanks to technological and communication breakthroughs, labor has become more and more mobile and resulted in countries competing to attract foreigners.[45]

As mobility of human capital increases, the understanding of more and more countries of human mobility becomes essential for economic development and growth to both developed and developing countries. This understanding has led certain, mainly European, countries to offer a quick and legal way for foreigners to obtain citizenship directly, or a long-term permanent residence status (denizenship – long-term permanent residency status),[46] which can mean better investment opportunities abroad, a safe destination for them and for their families, protection for their money from being nationalized or confiscated by dictatorship governments, and political protection in crises.

It can also, to a certain extent, give them a better quality of life, including better educational and occupational opportunities, and one way to attract them was to offer them favorable tax treatment that shields most of their income and gains from comprehensive taxation, or to offer them significantly reduced rates for an extensive period (such favorable tax regimes are referred to as non-domicile tax regimes).[47] However, such favorable tax breaks have been

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[45] Avi-Yonah, *supra* note 2, at 1575–1578.

[46] Tamir Shanan & Doron Narotzki, *Citizenship and Denizenship in the International Tax Context in an Era of Global Economy* 35 Florida Journal of International Law (forthcoming, 2023).

[47] Doron Narotzki, Tamir Shanan & Vered Kuperberg, *Last Call to 'Acquire' Investor Visas?* 110 Tax Notes Intl 1313, 1315–1316 (2023). The following is a non-exhaustive list of countries that offer favorable tax regimes for foreigners: Costa Rica, Cyprus, Georgia, Guatemala, Hong Kong, Ireland, Israel, Italy, Macau, Malaysia, Malta, Monaco, Nicaragua, Panama, Paraguay, Singapore, Thailand, The Philippines, United Arab Emirates and the United Kingdom. See also OCED, *Residence/Citizenship by Investment Schemes* (last visited the website on 30/9/2023), https:// www .oecd .org/ tax/ automatic -exchange/ crs -implementation -and -assistance/ residence -citizenship -by -investment/ #: ~: text =

offered by certain countries not only to attract foreigners but also to preserve educated and trained members.[48]

We therefore call to develop mechanisms that would neutralize favorable tax regimes that are abusive and unjustifiable, that would capture individuals' attachments to countries in more meaningful ways and that would acknowledge the economic reality in a global world which recognizes that an individual may have meaningful attachments to more than a single country, and develop a non-binary approach. Further, we propose revisiting such rules while considering the technological and communication breakthroughs that have changed dramatically the compliance costs from one end and the end of the era of tax confidentiality, the weakening of foreign bank secrecy, and the expansion of global information sharing, which may be a beginning of a new era of transparency.

5. OUR PROPOSAL

While a century ago fiscal residency for tax purposes has been of relatively less importance as the source countries were awarded the so-called "first bite of the apple" in taxing cross-border income and gain, determining residency was still important when the source country's effective tax rate wasn't as high as the tax burden of the residence country. Furthermore, even under the source-based taxation premises, residency determination was still significant in determining residence-based taxation for various passive types of income and gains, including interest income, dividend distributions, royalties, capital gains from stocks and bonds, and certain passive income generated by intangible investments.[49] As we indicated previously, over the past several decades the significance of fiscal residency determination for individuals for tax purposes has become

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Financial%20Institutions%20do%3F,What%20are%20CBI%2FRBI%20schemes%3F,or%20against%20a%20flat%20fee.

48 Kostić, *supra* note 25, at 372–373 referring to recent tax breaks offered by Poland and Croatia to its young population to prevent what could have been a demographic catastrophe: "faced with a situation which can be described as a demographic catastrophe in 2019 Poland and Croatia introduced tax measures which provide a more beneficial treatment to those under the age of 26 in the case of Poland and the age of 30 in the case of Croatia. Croatia offers those under the age of 25 a full exemption from employment income taxation, and a 50% one for those between the ages of 25 and 30. Poland exempts those under the age of 26 from income tax provided their income is below a statutory threshold which is set some 50% above the average income level."

49 Edward A. Zelinsky, *Citizenship and Worldwide Taxation: Citizenship as an Administrable Proxy for Domicile*, 96 Iowa Law Review 1289, 1294 (2011).

even more acute due to technological and communication breakthroughs that eroded the significance of the geographical nexus and have questioned the justifiability of allocating taxing rights to taxing jurisdictions with nice beaches, wild landscape, and a good climate with no significant contribution to the intellectual element that is responsible for the production of such labor income, which also impacts the authority to tax royalties, dividend and interest income.

Under the existing tax rules, domestic tax systems define fiscal residency for each taxable period (generally calendar year) separately, without considering previous years' relationship or connectedness between such county and the taxpayer. Ignoring previous familial, social, and economic connecting background is, in our view, mistaken, as human capital appreciation raises risks of brain drain losses and might disincentivize and jeopardize publicly funded medical, welfare and educational institutions.

Furthermore, even countries that adopt an exit tax (tax rules that consider abandonment of residency as realization for tax purposes and enable taxing appreciated and unrealized gains currently) to capture unrealized built-in capital appreciation seldom apply such exit tax norms on unrealized human capital appreciation (exit tax applies on property but not necessarily on education, knowhow and skills, reflecting one's earning potential) and mainly concentrate on taxing financial property, such as stocks, bonds, and other rights or intellectual property registered as acquired by the individual taxpayer while being a member in that taxing jurisdiction before they revoked their tax membership in that country.

Lastly, many countries use connecting factors that are either insignificant enough from one end or relatively easily manipulated such that the taxpayer can acquire them or abandon them relatively easily. The ability to acquire/abandon fiscal residency in a certain taxing jurisdiction may even result in situations where a person may be regarded by certain countries as stateless for tax purposes and being a resident of the world and not being a resident of any particular taxing jurisdiction. In such cases, the application of bilateral tax treaties is worthless, as they come into play only when the taxpayer is considered a resident in both contracting countries, whereas they are silent when the individual taxpayer is considered stateless in both contracting states.

We therefore propose the following alternative regulatory framework that, in our view, would impair most of the tax accidents that we mentioned and would strengthen the relational duties people have with their countries and the distributive justice among countries:

First, adoption of a non-binary approach in determining fiscal residency for tax purposes of individuals possibly entails more than a single legitimate claim to tax an individual based on their personal allegiance. Such multiple tax claims may sound appealing at first instance but could also be a trap to the unwary as they may result in double/multiple taxation, which would result in an overall excessive tax burden that would disincentivize globalization. Nevertheless, we propose replacing the residency binary approach with a non-binary approach. However, such a change requires additional modifications that would make sure a taxpayer's overall tax burden may not exceed the highest effective tax burden in any of the taxing jurisdiction in which they are its member and would require achieving a consensual formula that would include consensual criteria and weights that would allocate taxing rights among the relevant resident countries.

Second, we propose setting a minimal economic or physical presence (time period) threshold that would simplify the residency determination process and would not require reporting and filing returns in each taxing jurisdiction in which a taxpayer visited and spent several days or in each jurisdiction the taxpayer invested or commercially developed economic relations with. However, we also call to shorten the 183-day (six month) period as it is outdated and assumes migratory mobility limitations, expensive compliance challenges that may have been justifiable decades ago but are clearly no longer viable in today's economic reality.

Third, it is recommended to propose adoption of a novel set of criteria (clearly not a single determinative criterion but several criteria) that would correspond with the economic and social reality in which we live and would be able to accurately capture who should be considered a member of society. Furthermore, it is recommended that under these new sets of rules, an individual taxpayer that was defined a resident could not be viewed as renouncing their fiscal residency unless they acquire a new residence in a taxing jurisdiction that taxes them on a comprehensive basis under the same rates offered to the general public in that taxing jurisdiction (no one should be regarded stateless for tax purposes).

The fourth recommendation refers to the need to protect the tax basis on one hand and the progressive nature of the operation of the income tax systems on the other hand. We propose that income tax systems should develop measures that would make sure all cross-border income is taxed currently, and not less important that such income is taxed meaningfully. That is why we propose developing carve-out rules for countries that offer abusive favorable tax regimes that would either revoke these countries' taxing rights altogether or that would add additional jurisdiction to tax such income to other countries. We also propose developing methodologies that would maintain the progressive nature of the application of such taxes that are imposed by different tax systems – for example, by exploring the concept of a global alternative minimum tax burden, or by disallowing or limiting tax treatment that is more favorable to foreigners over nationals.