EUROMEMO GROUP CONFERENCE

London, September 20-22, 2013

TAXING TNCS: WHAT IS WRONG AND HOW TO FIX IT

Sol Picciotto[1]

1. INTRODUCTION

The fiscal crisis following the financial crash of 2007-8, and its attendant austerity policies in many countries, have generated widespread political pressures leading, amongst other matters, to growing attention to the inadequacies of the system for international tax coordination. A spotlight has been cast in particular on the ability of large transnational corporations (TNCs) to avoid tax, as shown in many news reports[2] and legislative inquiries[3].

The political pressure has been channeled through the G20 leaders, who have called for proposals to reform the international tax system. These calls have been directed at the OECD, which has been the guardian of this system since 1956, through its Committee on Fiscal Affairs (CFA).[4] The G20 gave strong political impetus in July 2012 to the CFA's project on Base Erosion and Profit Shifting (BEPS), resulting in an interim report in February 2013, and an Action Plan in July 2013 (OECD 2013b), approved by the G20 leaders in September. This envisages an ambitious work program of 30 months which aims to repair what it accepts to be a dysfunctional system. The report heralds this as no less than "a turning point in the history of international co-operation on taxation".

---

[1] Emeritus professor, Lancaster University; a Senior Advisor of the Tax Justice Network, and coordinator of a research programme on unitary taxation with special reference to developing countries for the International Centre for Tax and Development (see http://www.ictd.ac/en/unitary-taxation-transnational-corporations-special-reference-developing-countries).

[2] For example, `The Tax Gap' *The Guardian* (London) February 2009, http://www.theguardian.com/business/series/tax-gap; Drucker 2010, Bergin 2013.

[3] Notably: Cooper 2012 (Australia); Colin & Collin 2012 (France); UK House of Commons 2012, 2013; UK House of Lords 2013; US Congress 2013.

[4] The CFA was set up by the then OEEC, after the de facto suspension due to deep east-west and north-south splits of the UN Tax Commission which was intended to continue the work on tax of the League of Nations. The UN later established an Ad Hoc Group of Tax Experts in 1967, slightly upgraded to a Committee of Experts in 2004; this has remained a very low-level committee, with minimal resources (one full-time official), largely due to the consistent opposition of OECD states to its upgrading; its activities are therefore largely limited to tracking the work of the OECD in updating the model tax treaties on which are based the bilateral treaties which form the skeleton of the international tax system. The OECD by comparison now has around one hundred officials in its Centre for Tax Policy and Administration, mainly seconded from national tax administrations. Key non-OECD countries are invited to participate as Observers, and the OECD has also established Global Forums, notably the Global Forum on Taxation, renamed the Global Forum on Transparency and Exchange of Information for Tax Purposes (which includes tax haven countries).

However, the Action Plan envisages only a series of repairs to the existing system. It explicitly rejects a new approach, which many specialists and civil society groups have long advocated, for unitary taxation of TNCs. This paper will explain and discuss the reasons for the OECD perspective, the fundamental flaws which make the current system dysfunctional and the prospects for the repairs envisaged in the Action Plan; the last section outlines how a transition to a more effective system based on unitary taxation is both necessary and possible. [Readers may of course go straight to this final section if they prefer.]

The paper also offers an exemplary case study of the tensions in contemporary global economic governance, dominated by regulatory networks made up of technical specialists with strong symbiotic interactions between public and quasi-public officials and corporate business advisers, operating with little political accountability (see generally Picciotto 2011). The generation of alternative proposals and visions depends on the ability of civil society networks to combine cogent technical critiques with effective political strategies for change.

2. Development of the International Tax System[5]

Taxes are the foundation of all states, and taxes on income or profits of individuals and corporations have powered the development of the capitalist welfare-warfare state during the 20th century. Although such taxes are national, they have been internationally coordinated, especially in their application to international investment income. National claims to tax can be based on the location of the activity (source taxation) or of the person taxed (residence taxation), which inevitably creates potential conflicts. These can be dealt with by unilateral measures (exemption of foreign income, or allowing deduction of or a credit for foreign taxes) or international agreement. As income taxes became more important in the first two decades of the 20th century, business pressures led to such unilateral measures by some states (e.g. the US foreign tax credit in 1917), and to discussions about international coordination through the League of Nations. An international conference organized by the League in 1928 produced four model conventions to be used as the basis for bilateral treaties.

These models continue to provide the basic skeleton of the international tax system today, while some flesh is put on these bones by the Commentaries on the model treaties, as well as technical reports, produced by the organizations which have been guardians of the treaties (the League, the OECD and the UN). However, the sinews are provided by the technical experts who construct, elaborate and operate the system. They form a specialist community with its own knowledge, language and culture, made up of both government officials and business advisers (since individuals move freely between the two spheres), formed and strengthened through the activities of organisations such as the International Fiscal Association (IFA), and through contacts in professional practice. A notable example was Mitchell B. Carroll, an American partly educated in Europe, who worked for the US government, became the US representative on the Fiscal Committee, then went into private practice, helped to found the IFA, and was its long-serving first president.

2.1 The Tax Treaty System and International Avoidance

The model treaties of 1928 were aimed mainly at portfolio investment, which was the then dominant form of international capital flows. They allocated the primary right to tax business profits to the source or host state, while returns on such investment (dividends, interest, royalties) could be taxed by the state of residence of the investor. Some significant foreign direct investment had taken place since the 1870s, leading to the emergence of the first TNCs, and Carroll prepared a report for the League, surveying national practice and making

[5] For a more detailed discussion see Picciotto 1992, and Picciotto 2013a.

recommendations (Carroll 1933). He found that tax authorities were aware that local affiliates of foreign companies were rather different, because of the control exercised by the foreign owner. If they operated through a branch, it might not have separate accounts; if it did, or in the case of separately incorporated subsidiaries, those accounts would be strongly influenced by the parent, with which it would be likely to have significant two-way flows of finance, goods and services. To deal with this, countries had enacted laws giving their tax authorities powers to ensure that the tax base of a branch or affiliate of a foreign firm reflected a fair proportion of the profits made by the firm as a whole.[6] For practical reasons, the starting point was the separate accounts of the local entity, but various methods were used to verify the declared profits, especially by comparing the accounts with those of similar but independent local firms, as well as examining the accounts of the parent or related business to ascertain the breakdown of income and costs with the affiliate.

Carroll's report recommended that the international system should be based on treating affiliates as separate entities from the parent, but with a provision allowing their accounts to be adjusted as appropriate. Carroll considered that the aim should be to ensure that there had been no `diversion' of profits, so he recommended that such adjustment should be based on the `independent enterprise' standard. Accounts should be based on what became known as the Arm's Length Principle (ALP): attributing to the entity `the net business income which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions'. This was adopted as the basis for treaties based on the League of Nations model, and with some rewording remains the principle laid down in model treaties today (article 9). In the case of a branch, the treaties allowed source taxation only if it constituted a `permanent establishment' (PE), and its profits could be estimated as a suitable proportion of those of the firm as a whole.

States negotiated only a handful of actual treaties in the 1930s; but the US-UK treaty of 1945 relaunched the process, and the work of the CFA facilitated the growth of a network of treaties among OECD countries, which were both exporters and importers of capital, so found it easier to agree on principles for allocating tax jurisdiction. Nevertheless, it took over 20 years from the establishment of the CFA in 1955 for the OECD countries to negotiate a network of DTTs among themselves, as well as some with other countries.[7]

In the meantime, TNCs became adept at exploiting the many loopholes in the interaction of national tax laws in order to minimise their tax exposure. From their perspective, many of the devices to which they resorted were necessary and reasonable, to counter the inadequacies of international coordination. Two main techniques were devised. One, dealt with in the Carroll report, was profit-shifting by the adjustment of internal transfer prices, which came to be known as transfer-pricing. The second, which became much more important, was the creation of intermediary entities in convenient jurisdictions or `tax havens'.

This device had already been pioneered early in the 20th century by wealthy individuals and families for tax evasion (illegal tax-dodging). The further development and systematisation by TNCs of the facilities and techniques of the tax haven system had much more far-reaching and serious consequences. In particular, it became linked to the wider system of `offshore'

[6] In the UK, for example, from 1915 the Revenue had the power to tax a non-resident doing business in the UK through an agent, branch, or subsidiary on a share of the total profits based on the proportion of turnover in the UK. Similarly, German courts developed the concept of `organic unity' (*Organschaft*) to allow taxation of TNC affiliates on a proportion of its global profits (Picciotto 1992, 177-83).

[7] Some OECD countries (e.g. the Netherlands and the UK) extended their tax treaties to their colonies and dependencies, which continued them after independence.

finance and regulatory avoidance, which played a major role in the shift towards `financialisation' and the financial instability culminating in the crash of 2007-8 and ensuing economic crisis.

The basic principles of tax avoidance can be summarised quite simply, although many of the techniques became extremely complex. Essentially, it consists of channeling payment flows through entities (a company, partnership, trust or other legal person) formed in jurisdictions where such receipts would be subject to low or no taxes. This can be done by using such intermediary entities to carry out activities (e.g. financial transactions, transportation, providing advice or other services), or to act as `holding companies' owning assets (e.g. intellectual property rights, bonds, shares). These entities usually exist only on paper, perhaps with a name-plate on an office building, but diverting payments to them by well-designed routes can greatly reduce taxes on the corporate group of which they form a part. More recently, TNCs have become adept at locating key parts of their activity in convenient `production havens', to which large profits can be attributed. So, for example, Google conducts its worldwide sales of advertising through an affiliate formed in Ireland (but treated under Irish law as resident in Bermuda), and Amazon's sales in Europe go through Amazon SARL Luxembourg. Intel's main production facilities have been located in jurisdictions which grant tax holidays, such as Israel, Malaysia and Puerto Rico (Avi-Yonah 2000).

It should be stressed that these methods do not usually involve deliberate and therefore unlawful tax evasion, but entail finding ways through the often murky grey areas of tax law, for tax avoidance, which may or may not be legal. A central bone of contention is the claim of the `home' state to tax the worldwide profits of `their' TNCs, subject to a credit for foreign taxes paid, including those profits from their foreign operations which are not actually remitted to the parent. In the US in particular there have been long debates about whether and the extent to which such tax `deferral' is legitimate, dating back to the 1950s (Picciotto 1992, 109ff), which are still alive today (Fleming, Peroni & Shay 2009, US Congress 2013).

An argument in favour of deferral is that these profits are subject to tax at source, as the business profits of the affiliate in the host country. However, the tax liabilities of such affiliates can be greatly reduced by the deduction as costs of payments to related affiliates, such as interest on loans, royalties for intellectual property rights, or charges for services. This minimises the host country's taxation of the affiliate's profits, while withholding taxes on the payments can be reduced or eliminated if they are routed through a conduit company in a country with which the host has a tax treaty, e.g. the Netherlands (the famous `Dutch sandwich'). The profits can then be passed through to another affiliate in a country which either has no or low taxes, or exempts foreign-source profits. Such techniques in effect provide TNCs with a cash-flow of retained earnings which have been subject to low or no taxation, and which can be used for further expansion of their business (Picciotto 1992, 114-5).

This is also the reason for the current offshore accumulation of untaxed `stateless income' (Kleinbard 2011a), estimated for the US alone at at over $1.7 trillion. In May 2013 it was reported that Apple, which was estimated to have a $145b cash pile, planned to borrow $17b to partly fund a special dividend. As an editorial in the Financial Times commented (2nd May), `Tax makes companies do strange things': this was just a more tax-efficient way to satisfy shareholders than by repatriating profits, which would be taxed, while the interest on the loan would be tax-deductible.

The rapid growth of TNCs since the 1950s, much of it funded through such retained earnings, led to the systematisation of these techniques of avoidance. Indeed, that growth was partly due to the ability of TNCs to reduce their cost of capital by using such avoidance techniques

to reduce their effective tax rates overall. The use of tax havens was also linked to the growth of the offshore finance system, which offered facilities, above all secrecy, which could be used for both avoidance and evasion, as well as laundering the proceeds of crime and corruption. TNCs remain the main users of the offshore secrecy system, lending it some respectability. If this could be removed it would be much easier to deal with the more disreputable uses.

2.2 Anti-Avoidance Rules

Concerns about tax avoidance by TNCs resurfaced in the 1960s, especially in the United States, the home of many of them. It therefore introduced various anti-avoidance rules, which were then internationalised, to some extent, through the OECD.

2.2.1 Measures against Tax Haven CFCs

To combat the use of tax havens, the U.S. in 1962 enacted measures (Subpart F of the Internal Revenue Code) to include in the profits of a US parent company the income of its affiliates formed in low-tax countries, if they fall within the definition of a `controlled foreign corporation' (CFC). Other states such as France Germany and the UK followed. In response, Switzerland argued that they conflicted with the `separate entity' principle, so would be invalid without revisions to existing treaties. Other OECD members did not go so far, but CFC rules do indeed conflict with the separate entity principle, and the CFA therefore concluded that such rules should comply with a `consensus' which it would coordinate.

In practice it has not played this role, although countries which have introduced CFC rules (around half of the OECD states, plus a few others), have followed similar general principles. Essentially, such regimes rest on three tests: (i) ownership or control (to identify an ultimate parent), (ii) `passive' income, and (iii) low tax. All these have become increasingly difficult to apply: the first, as TNCs have become more decentralized and regionalized, and many have adopted multi-tier structures; the second, with the growing importance of services and other activities which can be `virtual'; and the third, with the growth of preferential and low-tax regimes providing "production havens" (e.g. Ireland). In practice, CFC rules have provided a legitimation for tax deferral.

CFC regimes of EU member countries have been further weakened because they now also must pass the test applied by the European Court of Justice (ECJ) that CFC rules can only apply to "wholly artificial" arrangements in other EU states, otherwise they are considered to restrict the right of establishment, a cornerstone of freedom of movement in the common market. The applicability of the UK's CFC regime to Ireland and Luxembourg was indeed invalidated by ECJ rulings applying this new principle.[8]

These trends have also made it easier for TNCs to pressurize their home countries for relaxation of CFC rules, by threatening to relocate (and in some cases doing so), and governments have duly obliged. Thus, the US, by accident or design, has allowed Subpart F to be emasculated by the check-the-box and pass-through rules. The UK largely abandoned its CFC regime and adopted an essentially territorial system, effective from April 2013, and the US is now urged by many to do the same. Indeed, the UK also introduced the so-called `patent box', which is in effect a preferential regime.

[8] See *Cadbury Schweppes PLC, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*, Case C-196-04, European Court of Justice (2006) (a CFC in Ireland); and *Vodaphone 2 v. HMRC* EWCA Civ 446 Case No: A3/2008/2235 CA (2009) (a CFC in Luxembourg).

2.2.2 Transfer Pricing and the Arm's Length Principle (ALP).

To combat the second main problem the US, after several years of consultations, in 1968 introduced detailed transfer pricing regulations elaborating how internal prices within TNC groups should be determined. The CFC approach effectively overrode the separate entity principle, by treating affiliates in some circumstances as if they were part of the parent. In contrast, the 1968 Transfer Pricing Regulations took a diametrically opposite approach, strengthening the 'separate entity' principle by cementing into place the `arm's length principle' (ALP), under which transactions between related entities should be treated as if they were separate entities dealing at `arm's length'. In particular, the U.S. regulations specified that where possible the prices of specific transactions should be based on a comparison between the TNC's internal (`controlled') price and prices charged between independent enterprises ( the `comparable uncontrolled price': CUP). Only as a fall-back, where these were not available, did they allow other methods.

Recognising that these regulations had international implications, the issue was taken up through the CFA, which produced a report in 1979 on *Transfer Pricing and Multinational Enterprises.* This defined a consensus around the ALP, generally following the approach in the US regulations.

But there is a fundamental flaw of the ALP: in economic reality TNCs exist because of their competitive advantages: economies of scale and scope, and the control of unique technology or know-how. Hence, as studies have repeatedly shown, it is not only extremely complex and time-consuming to try to identify comparables, but in the large majority of cases true comparables do not exist. The US Regulations therefore offered two alternatives: the resale price minus a profit margin, or the cost price plus a mark-up. Although these are described as transactional pricing methods, in reality they aim to identify the appropriate profit level of the affiliate. However, they do so in comparison with other firms in the same line of business, so again they tend to overlook the competitive advantages of TNCs, and are inappropriate for TNCs with internationally integrated activities. As a final fall-back, the regulations also allowed `other' methods, which included apportioning the aggregate profit.

Indeed, even as the ALP became enshrined in the OECD Guidelines, criticisms of this approach had mounted in the USA, fuelled by several studies showing its limitations, including one for the US Congress in 1981.[9] In 1988 the US Treasury announced a new approach (US Treasury & IRS 1988), which would severely restrict transactional pricing methods to cases where an `exact comparable' could be found, and put forward a new method to calculate an `arm's length return'. This was to be done by attributing to the affiliate a profit based on analysing its functions and applying an industry average rate (the `*comparable profit method'*, or CPM).

This new US view led to sharp conflicts within the OECD for several years, with big business lobbies joining other tax administrations in attacking the US line. The disputes were patched up with the issuing of the 1995 Guidelines, which reformulated the new US approach, to try to assimilate it to the ALP under the rubric of `transactional profit methods'. These are the `transactional net margin method' (TNMM) and the `profit split method'. The Guidelines

[9] US-GAO 1981; this report concluded `Because of the structure of the modern business world, IRS can seldom find an arm's length price on which to base adjustments but must instead construct a price. As a result, corporate taxpayers cannot be certain how income on inter-corporate transactions that cross national borders will be adjusted and the enforcement process is difficult and time-consuming for both IRS and taxpayers. ... We recommend that the Secretary of the Treasury initiate a study to identify and evaluate the feasibility of ways to allocate income under s.482, including formula apportionment, which would lessen the present uncertainty and administrative burden created by the existing regulations' (US GAO 1981 p.52-3).

stress that these are the only such methods compatible with the ALP, and this affirmation was linked to a strong rejection of any use of `global formulary apportionment', although this is defined narrowly as apportionment by a formula `fixed in advance'. At the same time, the Guidelines moved away from expressing an explicit preference for transactional pricing methods, and now say that the aim is to find `the most appropriate method for each case' (OECD 2010, p.59).

As a result, the Guidelines became highly contradictory, even incoherent. Although the new methods are described as `transactional', they can be applied to `aggregate' transactions. So they are, in effect, profit apportionment methods, although the question of which transactions can be aggregated raises significant legal issues (Wittendorf 2013). In fact, only the CUP focuses on pricing of comparable products, all the other methods attribute a level of profit considered appropriate. The cost plus and resale price methods, accepted since the 1930s, use as the criterion the profit margins of firms manufacturing or selling comparable products. The TNMM can be applied to a wider range of affiliates than just manufacturing or retailing, as it begins by identifying the function performed. It also requires less product comparability; so it authorises attribution of net profit by applying an appropriate rate of profit to a suitable base, e.g. costs, assets or sales. This is regarded as being suitable for an affiliate which does not make a `unique' contribution, i.e. it performs a specific and rather generic function, such as contract manufacturing. In practice the TNMM is a method for apportioning profits, by applying an analysis of economic factors, and hence a step towards formulary apportionment.

The `profit-split' method goes further, and allows the apportioning of the combined profits according to an appropriate measure of the contribution made by each. The Guidelines say that it is appropriate where the related entities are closely integrated, or both make `unique' contributions. They accept that this method `tends to rely less on information about independent enterprises', but claim that the `overriding objective should be to approximate as closely as possible the split of profits that would have been realised had the parties been independent enterprises' (paras. 2.114-5). This sophistry does nothing to conceal that this method accepts that the competitive advantages and synergies of a TNC generally generate additional profits which the fragmented analysis of specific affiliates based on the other methods could simply overlook. Thus, profit-split allows allocation either by a percentage based on an evaluation of the contributions made by each affiliate, or by applying one of the other methods to each of them, and then apportioning the `residual'. The split can be based on one or more `allocation keys', such as assets or capital employed, costs, headcount, or sales.

As several commentators have pointed out, the profit-split method is essentially a unitary approach with formulaic apportionment, albeit not using a formula `fixed in advance', but one chosen ad hoc. It has been used for some 20 years in `advance price agreements' (APAs), especially to apportion the profits from 24-hour global trading of financial instruments, where a trading book is passed on to offices in different time-zones (e.g. New York, London, Singapore).[10] Hence, it has been suggested that it provides a basis for at least a partial transition towards unitary taxation, by using formulary apportionment to divide the `residual' (Avi-Yonah, Clausing and Durst 2009). These ideas have taken on a much greater salience as the political pressures generated by media reports and activist campaigns about TNC tax avoidance galvanised the OECD's BEPS project into a serious investigation of a new approach in 2013 (see further below).

[10] See US Treasury Notice 94-40 (1994 IRB LEXIS 213), which states that the main apportionment factor should be the traders' remuneration.

In the meantime, the Transfer Pricing Guidelines are a recipe for increasing conflicts, especially as emerging and developing countries have introduced transfer pricing regulations, and some have begun to enforce them. For example, India enacted specific transfer pricing regulations in 2001, thus setting off what one commentator has called the `great Indian transfer pricing circus' (Vijayaraghavan 2012). Transfer pricing quickly developed into a boom area of professional practice, controversy and litigation. By fiscal year 2007-2008 tax authorities were reported to have made transfer pricing adjustments of close to $9 billion, and a decade after the regulations were passed 3,000 transfer pricing cases were pending before the Income Tax Appeals Tribunal, which had to establish four special benches to deal specifically with them (Supekar & Dhadphale 2012). It is hardly surprising that this led to calls for a radical re-think (Vijayaraghavan 2012). The Indian authorities have attempted to improve the situation, for example by introducing an APA programme. However, they have run into conflicts with both business representatives and the US tax authorities, who have complained that their interpretation and application of international tax rules are `advancing a policy agenda'. The US competent authority publicly announced that bilateral APAs with India were not possible, apparently because of India's preference for abandoning other transfer pricing methods and going `right for some sort of profit-split' (Parillo & Trivedi 2013).

Others among the BRICS countries, as well as developing countries more generally, also report that they find it hard or impossible to find adequate comparables, and prefer methods that are easier to administer. Although they affirm their adherence to the OECD Guidelines, they often also emphasise the need for a `holistic approach'. In practice, the methods they prefer are very different from each other, and from those of OECD countries.[11] Thus, Brazil relies on the Resale or Cost-Plus methods, but using specified fixed margins. This has led to criticisms in the OECD Committee from others who regard it as a significant departure from the OECD Guidelines. In contrast China, which also finds it hard or impossible to find comparables, prefers profit-split methods, but takes account of distinctive factors, notably `location-specific advantages' which it considers justify allocation of higher profits to Chinese members of TNC groups. India also employs this criterion for adjustments. However, this approach also is likely to produce results which diverge from those acceptable to OECD countries.[12] So even as the OECD approach is extended to other countries, it is likely to create increasing problems due to divergent approaches, while most countries will lack the capacity to apply it effectively.

2.3 From Preventing Double Taxation to Dealing with Double Non-Taxation

The aim since the 1920s has been that international rules should prevent both double taxation and `fiscal evasion'. In practice, as shown above, the system has enabled and encouraged tax avoidance by TNCs, which can exploit the loopholes of the `separate entity' and `arm's length' principles, and the ambiguities of definitions of residence and source, so that substantial income flows are not taxed anywhere. The treaty-based system has proved largely inadequate to deal with this. The 1928 model treaties included a separate convention for mutual administrative assistance and tax collection; this was never used, instead a minimal provision for exchange of information was included in the double tax treaties.

[11] The UN Manual includes helpful outlines of the difficulties faced and approaches adopted by Brazil, China, India and South Africa (UN 2012, ch. 10).

[12] The OECD Guidelines (paras. 9.148-153) do discuss the issue of `location savings' in the context of the restructuring of a TNC's operations to relocate activities to a lower-cost country, in terms of how such savings should be allocated among the parties. China and India appear to have broadened out this concept considerably and, not surprisingly, stress their own locational advantages as factors that justify a higher allocation of profit.

Provisions to try to prevent treaty abuse or tax avoidance have been left largely to each state. The model treaties do not include any rules relating to CFCs, nor on `limitation of benefits' (to try to prevent avoidance through `conduits'), nor even a general anti-abuse provision, although they have long been described as treaties for the prevention of double taxation and fiscal evasion. Only the Commentaries include some sample provisions which states could use, but in practice it is just strong states (such as the US) which have done so, others are deterred by the fear of discouraging investment, and the technical and political problems of negotiation.

Treaties are generally implemented in national law so as to override other tax provisions, so creating special tax regimes for TNCs. This may include the Commentaries and documents, such as the OECD Transfer Pricing Guidelines, which are either incorporated legislatively or used by courts as authoritative guides to interpretation.[13] So, for example in India, the Supreme Court refused to apply the general anti-abuse principle of Indian tax law to prevent the use of intermediary companies in Mauritius to avoid capital gains tax (India v. Azadi 2003); more recently, it rejected an attempt by the Indian tax authorities to tax Google's profits from sales of advertising in India, applying the tax treaty interpretation in the OECD Commentary on taxation of e-commerce, even though India had expressed a reservation on that point, on the grounds that the reservation was insufficiently precise (Right Florist 2013).

Indeed, for the past 20 years the CFA has worked assiduously to strengthen the existing dysfunctional rules, especially the separate entity principle. This can be seen especially in relation to its work on e-commerce and the digital economy. As early as 2000 it issued `clarifications' in the Commentaries (OECD 2000), followed by a lengthier study by a Technical Advisory Group, including business representatives (OECD 2005). These essentially concluded that no significant changes were needed to the PE concept to deal with e-commerce, and that a website should not be considered a PE, although a server could be. Given the physical characteristics which are central to the way a PE has been defined since 1928, this was entirely logical and perhaps appropriate at that time. Now that the likes of Amazon have cut a destructive swathe through bricks-and-mortar retailing, the mistake is clear. In parallel, the CFA conducted a radical re-examination of the concept of a PE, essentially to bring it into line with the separate entity principle which had been embedded into the Transfer Pricing Guidelines in 1995. This resulted in the concept of `functional separation' of a PE, implemented first in 2008 by changes to the Commentaries and then by amending the text of the article in the model treaty itself in 2010.[14] However this new `authorised OECD approach' to the PE was rejected by the UN Tax Committee and developing countries generally, as well as some OECD countries, and others are being cautious in implementing it. So far, only a handful of treaties incorporating the changes have been negotiated; hence, there is a bewildering variety of versions of article 7 in bilateral treaties.

The OECD was therefore ill-prepared in the mid-1990s when emerging concern about tax havens and tax avoidance led the G7 to decide to take some action, and referred the tax aspects to the CFA. It nevertheless produced a report on *Harmful Tax Competition* in 1998, which aimed to tackle both the `classical' tax havens and the `harmful preferential tax arrangements' which had been growing. However, this project was effectively derailed by a

[13] In the UK, the Taxation (International and Other Provisions) Act 2010 s.164 explicitly provides that UK treaty provisions based on the OECD Model should be interpreted `in accordance with' the Guidelines; this in effect gives the unelected technocrats at the OECD delegated powers of legislation.

[14] This also excised the residual provision allowing formulary apportionment of P.E. profits which had been in article 7(4) of the OECD model until then; it remains in the UN model.

change in US policy, when the new Bush administration in 2001 accepted arguments that the initiative as first formulated entailed dictating tax policy to other states (Sharman 2006, Avi-Yonah 2009). It then refocused on obtaining information from tax havens, laboriously pursued for nearly a decade by negotiation of bilateral tax information exchange agreements (TIEAs). Only now, propelled by widespread publicity and scandals about tax evasion by rich and famous people, has this effort for fiscal transparency produced the commitment at this year's G8 summit meeting to establish a new global standard of automatic exchange of tax information, as well as transparency of beneficial ownership.[15] These commitments of course have yet to be turned into effective action.

This history clearly does not bode well for the new effort, initiated this time by the G20, to tackle `double non-taxation', in the project on Base Erosion and Profit Shifting (BEPS).

2.4 BEPS: Are Effective Reforms Possible?[16]

The BEPS Action Plan (OECD 2013b) proposes fifteen Action Points, of which nine are on substantive issues, and six are aspects of coordination or procedures. The latter include, first a study on the Digital Economy, agreed to reluctantly by the US at the insistence mainly of France, which will in effect be a check on whether the other action points can deal effectively with this issue, perhaps supplemented by indirect taxes. Another is the collection of better data on the extent of international tax avoidance. Two more concern transparency: the development of model provisions for disclosure of `aggressive tax planning' strategies, and improving transfer pricing documentation requirements.

Finally, and most ambitiously, a group of international lawyers will develop a multilateral instrument, as a means of more rapid implementation of proposals which would otherwise require renegotiation of many bilateral treaties. While this is potentially far-reaching, this idea is legally problematic. It would also act as a brake on developing radical proposals, since such a treaty would have to be accepted by states, so its content would tend to the least common denominator.

Of the nine substantive action points, the first group of four aim to establish `coherence of international tax standards' and concern issues on which the CFA has done little or no previous work. First is `hybrid mismatches': entities (e.g. corporations) or instruments (e.g. bonds) which have a different legal status in different countries, thus allowing entities to be dual resident, or instruments to be treated differently, e.g. as debt in one country and equity in another. A report in 2012 by the CFA envisaged formulation of model national laws. The Action Plan now seems to suggest more coordinated action, especially through model treaty provisions, which will prove legally complex and only partially effective.

Action is proposed on CFC rules, but this seems to be limited to development of model national laws. A more radical approach would be for a group of states to agree collective CFC rules (Burnett 2005), which would in effect pit one group of OECD states against another. Such a collective CFC system would provide effective pressure on states targeted as

---

[15] See 2013 Lough Erne Leaders' Communiqué: "We commit to establish the automatic exchange of information between tax authorities as the new global standard, and will work with the Organisation for Economic Cooperation and Development (OECD) to develop rapidly a multilateral model which will make it easier for Governments to find and punish tax evaders. … We agree to publish national Action Plans to make information on who really owns and profits from companies and trusts available to tax collection and law enforcement agencies, for example through central registries of company beneficial ownership." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf.

[16] For a more detailed and technical discussion see Picciotto 2013b

providing preferential regimes (e.g. Ireland), but it does not seem on the agenda. Another Action point is indeed to tackle such `harmful preferential tax practices'; but the only method suggested for this is to revive the Forum on HTPs, which was suspended a decade ago when the previous HTP initiative was derailed by the US. Without the stronger coercion that might come from concerted anti-CFC rules, all that remains is peer-pressure, which generally produces at best a gradual attrition of some measures, only to be replaced by others.

Finally in this group, proposals would be made for limiting deductibility of interest and other payments to related entities. The Plan proposes that in addition to developing `recommendations regarding best practices' for national rules, transfer pricing guidance will be formulated, and this work will be coordinated with that on CFCs and hybrids. Reconciling deduction limitation provisions via the transfer pricing arrangements will create further strains on that system, including the Mutual Agreement Procedure (MAP) for resolving conflicts. However, stronger coordination than best practice recommendations is needed to enable states to introduce such measures in the face of competition to attract investment, especially for developing countries, and there is no sign of the OECD providing this.

Next, the Plan aims to restore the `full effects and benefits of international standards' by modifying tax rules `to more closely align the allocation of income with the economic activity that generates that income'. It proposes to attempt this not by changing any particular rules, but through anti-abuse provisions. Action 6 refers rather widely to developing model treaty provisions as well as recommendations for national rules. The Model treaty has for long been largely ineffective for preventing double non-taxation, as discussed above, not least because neither the text nor the commentary contain a clear statement that all income must be taxed somewhere, and national courts have been unwilling to use domestic anti-abuse rules to override (or even to help interpret) treaty rules.[17] This could be remedied if suitable anti-abuse provisions were included in the actual model treaty, or even better in the multilateral treaty envisaged by the Action Plan. However, business is likely to object that general anti-abuse provisions would create uncertainty. Presumably to forestall this, the Plan refers to `tight' treaty anti-abuse clauses. It remains to be seen whether, for example, a `subject to tax' provision is considered to be sufficiently `tight' to be put forward.

Also to be dealt with through an anti-abuse measure is the issue of definition of and attribution of profits to a PE. This signals that there is no intention to rethink this concept or revisit the changes made by the CFA in recent years, discussed above, even though (perhaps indeed because) they are highly controversial. Nevertheless, without such a rethink it is unlikely that adequate solutions could be found especially for the problems posed by the digital economy. There will be increasingly wide divergences therefore between the `authorised OECD approach' on PEs, and the perspectives of developing countries and others which are mainly host states to TNCs.

Three action points concern the perennial problem of transfer pricing, and aim to continue and extend the revision of the Guidelines already under way since 2010, concerning the attribution of income to intangibles. This has become an intractable issue because the OECD approach has exacerbated the difficulties created by the separate entity/arm's length principle, by fetishising the very concept of `intangibles'. The oligopolistic profits of TNCs are to a great extent due to their control of superior know-how, but a firm's knowledge or know-how is very much a result of synergy, and it is very hard to value the different contributions to that whole, or attribute profits to particular parts. This is so even when such knowledge can take

[17] Notably, the Indian Supreme Court has refused to apply India's general anti-avoidance principle to invalidate the use of the India-Mauritius tax treaty, in its decisions in *Azadi Bachao Andolan* (2003) and *Vodafone* (2013).

the form of intellectual property, since this concept creates a misleading notion of the nature of innovation or creativity as individualised, episodic and discrete, instead of collective, continuous and cumulative.

In the pharmaceutical industry, for example, profits are commonly thought to be attributable to the specific primary research which results in patentable drugs. In practice, research is a continuous process, amassing knowledge in a general field and often resulting in a line of products. Furthermore, firms spend as much or more on development and testing, as well as marketing, and these activities are likely to take place in different locations from the basic research. In one notable case which became public because it had to be litigated, the pharmaceutical company GlaxoSmithKline was assessed for US$5.2 billion in back taxes and interest by the US Internal Revenue Service in 2004 related to profits from its anti-ulcer drug Zantac. Glaxo claimed it should be paid a refund of US$1 billion, so there was a difference of over $6b. The drug had resulted from research done in the UK, but the IRS argued that a significant proportion of the high revenues it generated in the US was attributable to Glaxo's US marketing intangibles. The dispute was finally settled with a payment by Glaxo of US$3.4 billion (Sullivan 2004).

The draft revised chapter of the OECD Guidelines on Intangibles issued a couple of weeks after the Action Plan (OECD 2013c) does propose some long-overdue changes. It would move away from attribution of intangibles profits on the basis of ownership, or provision of finance. This has enabled the likes of Google to accumulate enormous profits in low-tax countries such as Bermuda, due to the foresight of its tax advisers in transferring at an early stage the rights in its search algorithm to an affiliate resident there. Instead, profits would be attributed according to each entity's contribution to `value creation' through its ` functions performed, assets used, and risks assumed'. The extent to which any of these functions, assets and risk factors affect value is stated to depend on the facts and circumstances, to be decided ad hoc in each case. The draft is full of equivocation on how this can be done, on the one hand stating that as far as possible the starting point should be `comparables', while also conceding that `the identification of reliable comparables in many cases involving intangibles may be difficult or impossible' (OECD 2013c, para.164).

This in practice reinforces the general trend towards the use of the `profit-split' method of transfer price adjustment. Yet there is still a marked absence of any attempt to flesh out this method, for example by developing agreed tax base definitions for the aggregation of the profits, although the OECD's own documents accept that financial accounts are unsuitable for this purpose. The Guidelines include some general discussion of possible `allocation keys' which may be used for profit-split, but fall far short of providing any clear and predictable system.

As this brief analysis shows, the Action Plan aims only to try to repair the current system, and cannot remedy its fundamental flaws, which inevitably result from the separate entity / arm's length principle. Indeed, the Plan explicitly rejects any move towards `formulary apportionment' (OECD 2013b, 14). The main objection given is that, whatever its technical merits, it would be difficult or impossible to reach political agreement on such a system.[18] Interestingly, this is the same argument made eighty years ago in the Carroll report for the League of Nations. Yet the attempt to strengthen the existing system in the Action Plan is also fraught with political difficulties, indeed in many respects it is a recipe for generating

[18] See for example the comments of Pascal St-Amans, head of the OECD Tax Centre, in his evidence to the UK House of Lords Committee on Economic Affairs on 11th June 2013, question 107; available at http://www.parliament.uk/business/committees/committees-a-z/lords-select/economic-affairs-committee/inquiries/parliament-2010/taxing-corporations-in-a-global-economy-is-a-new-approach-needed/

conflicts between states, as each tries to modify or interpret the rules to grab a larger share of the tax base. The difference is that the reform plan defers the political conflicts, and transfers them into the highly technicised context of the CFA. No doubt there are many who will hope that over time the political spotlight will move on, perhaps even the fiscal crises will dissipate, and the pressures for effective solutions will relax.

3. Taking a New Approach

The issue now facing us is whether a way can be found out of this impasse. Applying further patches to existing rules now seems futile. What clearly seems necessary is to reorientate international tax rules and place them on a more realistic foundation, which can treat TNCs as single firms, instead of being based on the unrealistic fiction that they are a loose collection of separate and independent entities in each country. A number of proposals with this perspective have indeed been put forward. The most comprehensive is Unitary Taxation with formula apportionment (UT). This is widely accepted as a superior approach in principle, although not without its difficulties.

Such an approach has a long history. It has been used for state taxes in federal systems with unified markets, such as Canada, Switzerland and the USA. California, for example, developed it to stop Hollywood film studios siphoning profits out by using distribution affiliates in Nevada. Today, all 47 US states which have a corporate income tax use formula apportionment, although following a campaign by non-US MNEs in the 1980s it has been limited to their US business (`water's edge').

The EU also now has a fully worked out proposal for a Common Consolidated Corporate Tax Base (CCCTB), developed by the Commission in consultation over several years with business representatives and specialists. It was approved, with some amendments, by the European Parliament in April 2012 , and since then has been under consideration by the Council of Ministers. The proposal could certainly be improved, but if adopted it would go a long way towards dealing with many of the avoidance devices, e.g. the use of entities in Ireland and the Netherlands as conduits for low-taxed income flows. It is not surprising that such member states have opposed the proposal, but it is regrettable that others, including successive UK governments, have been sceptical or hostile, due to an unreasoning Euro-phobia. It has some defects, but the reasoning that national states would lose the power to define the corporate tax base seems weak: harmonizing tax base definitions would have significant advantages, as well as restoring national powers of effective taxation.

Proposals have also been made for various states to take unilateral measures, moving away from the separate entity principle dominating the current system. Thus, Ed Kleinbard has argued that the US should apply assessment of TNCs on their worldwide profits, with a credit for foreign taxes paid (Kleinbard 2011b, 2013). However, this approach essentially favours residence countries, and aims to enable these home countries of TNCs to reassert tax rights over the world-wide earnings of `their' TNCs, at least to the extent that they have been taxed at lower rates elsewhere. Michael Devereux and Rita de la Feria are developing a proposal for taxation of TNCs based on their income from sales defined by destination, although it is not clear whether this entails assessing related entities on a unitary basis, and if not whether it would deal with the problem of profit-shifting.[19]A somewhat similar proposal has been made in Germany for taxation of earnings before interest and taxes, by Jarass and Obermair (2008). The report for the French Ministry of Finance on the Digital Economy recommended

[19] Evidence of Rita de la Feria to UK House of Lords Committee on Economic Affairs, 11th June 2013, question 123.

unilateral introduction of a specific tax on the digital sector, but as a means of pressuring the OECD towards a more coordinated approach (Colin & Collin 2013, pp. 121-8).

Such measures may well be desirable in the short-term, although it remains to be seen whether governments' need for revenue and desire to placate public opinion will lead to their actual enactment, in the face of the pressures and threats of disinvestment that will inevitably come from corporate lobbies. In my view, we also need to look beyond these, and set our sights on how to achieve more fundamental reforms, moving towards a UT approach. While this would involve looking at TNCs through a different optic than the ALP, in my view an evolutionary and pragmatic shift towards a unitary approach is both necessary and possible. There are many elements of such an approach within the present system, which can be built upon. What is needed is a road map for such a transition. This will be sketched out in what follows.

3.1 Elements of a Unitary Approach

Unitary Taxation (UT) is not a panacea, but it would go a long way towards placing international corporate taxation on a sounder foundation. It would replace or greatly simplify most of the main complex and problematic areas of international taxation: not only transfer pricing regulations, but also rules on corporate residence and source of income, as well as anti-abuse provisions such as CFCs and limitation of benefits clauses. Compared with those thorny problems, the difficulties to be resolved in making UT workable are relatively minor. It does not involve wholesale replacement of one system by another: a gradual shift to UT is both necessary and possible. As a number of specialists have pointed out,[20] some elements already exist, which can be built upon. The need is for a road-map and a strategy for transition.

A workable UT system should have three components: combined reporting, profit apportionment, and a resolution procedure. Each can be introduced to some extent immediately, and could be refined gradually by building on existing provisions.

3.1.1 Combined Reporting

First, any company with a business presence in more than one country should be required to submit a Combined and Country by Country Report (CaCbCR) to each tax authority. This should include (i) consolidated worldwide accounts for the firm as a whole, taking out all internal transfers; (ii) details of all the entities forming the corporate group and their relationships, as well as of transactions between them; and (iii) data on its physical assets and employees (by physical location), sales (by destination), and actual taxes paid, in each country.

No change is needed to international rules for this. Indeed, states are already recommended to obtain such data by both the UN Practical Manual on Transfer Pricing, and the OECD's Draft Handbook on Transfer Pricing Risk Assessment of 2013 (para. 98). At present, however, few states have such a requirement, so tax officials starting from separate affiliate tax returns find it hard to see the big picture, and this is especially difficult for those in poorer countries.

Formalization of this requirement should be facilitated by drawing up an agreed template for such a CaCbCR. A good starting point for the standards for the consolidated accounts could be those in the proposed CCCTB, as they resulted from several years of work by technical specialists from many countries. However, they would need to be compared to the US federal tax accounting standards (also used for state formula apportionment), and those of other

[20] In particular, Avi-Yonah, Clausing and Durst (2009).

states, especially developing countries. International financial accounting standards (IAS) are not themselves suitable for this, as they have been drawn up for the purposes of financial accounting, and have in any case come under considerable criticism, for example in their emphasis on mark-to-market for asset valuation. However, tax authorities do generally consider financial accounting rules are an acceptable basis for tax accounts, subject to the modifications required for tax purposes. Hence, the existence of IAS should be helpful in some respects for the development of an international tax reporting standard.

The Combined Report should apply to all entities belonging to a unitary group, building on the criteria for ownership and control developed for the EU's CCCTB. It should exclude unrelated activities even if under common ownership and control, to prevent profit-stripping, learning from the `unitary business' concept applied in the USA.

3.1.2 Profit Apportionment

Secondly, states can use the CaCbCR to decide on an appropriate apportionment of the profit. This also can build on existing practice, in particular the profit-split method, which apportions the aggregate profits of related entities according to suitable allocation keys. This approach should be extended, because at present it envisages aggregation at the level of transacting entities, whereas MNEs use more complex cross-linkages among affiliates. There is already some experience in applying formulaic apportionment both of fixed and shared costs and of profits. Indeed, it has been applied for some 20 years in the finance sector, in APAs with banks, in relation to the profits of global trading through offices in different time-zones over 24 hours.[21] If firms such as Apple, Amazon, Google and Starbucks would really like to pay a fair level of taxes wherever they do business, they too could enter into APAs and agree an appropriate apportionment.

The experience of using profit split and APAs could be combined with proper research to determine the most appropriate apportionment formulae. The most balanced approach seems to be a 3-factor formula, using physical assets, employees, and sales. The assets factor should be limited to physical assets (as in the CCCTB), excluding intangibles, which (as discussed above) are elusive to define and value, and can easily be relocated. Some argue that there is no need to include assets, since they are of decreasing importance in the `weightless economy'. Nevertheless, in my view a general formula designed to apply as far as possible to all sectors should include an assets factor, provided it is indeed limited to physical assets. As regards employees, US states use employee payroll costs not headcount, but this would be inappropriate internationally, due to the greater wage differences. The proposed CCCTB would use a 50:50 weighting of payroll and headcount, which seems appropriate. Sales should be quantified according to the location of the customer. Sellers can and do identify the location of their customers for delivery purposes, and for sales of services and digital products at least through their billing address. Although customers may use accounts based in havens for such purchases, they would have no reason to do so in order to reduce the tax liability of the sellers.

Some argue that states would aim to weight the factor which produces the most revenue for them, so would never agree on a formula. In fact, states need also to consider the effects on investment, and in the US the trend has been towards the sales factor. A balance between production and consumption factors seems best. This could be locked in by adopting a 2-stage apportionment: an initial allocation to each country by production factors, then

[21] See US Treasury Notice 94-40 (1994 IRB LEXIS 213), which states that the main apportionment factor should be the traders' remuneration.

apportionment of the residual by sales.[22] Special formulae may be needed for specific sectors. However, it should be remembered that tax on business profits is only one instrument. For extractive industries in particular it must be supplemented by rent taxation, using royalties and/or a rent resource tax.

It should be stressed that this approach does not seek to *attribute* profit, since it assumes that the profits of an integrated firm result from its overall synergies, and economies of scale and scope. It *allocates* profits according to the measurable physical presence of the firm in each country. Some argue that firms could still reorganize themselves to minimize their taxes. However, if the factors in the allocation formula are based on real physical contacts with a country, such reorganizations would involve actual relocation of such factors. If they choose to divest to truly independent third parties some operations, e.g. retail sales, they would lose the profits of synergy and scale. It is hard to imagine a company such as Apple being willing to transfer to a truly independent wholesaler in a low-tax country a significant slice of its profits. Jurisdiction to tax should be based not on the physical presence concept of Permanent Establishment, but a broad business presence test, to include e.g. sales via a website.

States would remain free to choose their own marginal tax rates. Hence countries could compete to attract genuine investment rather than formation of paper entities aimed at subverting the taxes of other countries. Harmonisation of the tax base definition would greatly reduce the existing damaging forms of competition to attract investments by offering special exemptions. UT would therefore eliminate harmful tax competition, while allowing countries to make genuine choices between attracting investment in production and generating revenues from corporate taxation. Such a system would of course not be perfect, but aligning tax rules more closely to the economic reality of integrated firms operating in liberalized world markets would make it simpler and more effective.

3.1.3 Resolving Conflicts

The third important element is a procedure for resolution of disagreements and conflicts between states. This also is already provided for in the Mutual Agreement Procedure (MAP) in tax treaties, but it should be improved, and extended to include negotiation of APAs. This could increasingly be done on a multilateral basis, which is favoured by some TNCs. Developing countries should strengthen or develop APA negotiation programmes, and investment in expertise for these would be much more cost-effective than for transfer pricing adjustments based on comparables.

These procedures could also be considerably improved. In particular, the MAP is at present very secretive, and decisions often involving hundreds of millions or even billions of dollars are not published. The secrecy of both MAP processes and APAs greatly increases the power of frequent actors in these processes, i.e. the international tax and accounting firms, to the great detriment of the system as a whole. Publication of both would be a great step towards a system which could both provide and more importantly be seen to deliver a fair international allocation of tax.

CONCLUSIONS

I hope that the analysis in this paper has shown that international taxation is a process of coordination, which is necessary to ensure the effectiveness of national taxation. Hence, far from being a surrender of sovereignty, it is essential to maintaining and restoring the powers of national states. As the patterns of economic globalisation have changed, so should the

[22] As suggested by AviYonah et al., who suggest that the first step allocation could be based on operating expenses.

forms of international coordination. This is the challenge we now face. Some might also wish to see even more ambitious projects for global taxes, which might even be used for international redistribution to assist development. Those however are topics for another occasion.

BIBLIOGRAPHY

Avi-Yonah, RS, Kimberly A. Clausing, Michael C. Durst (2009) `Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split'. *Florida Tax Review,* 9: 497–553.

Burnett, CA (2005) `Replacing CFC Regimes with a Collective Attribution System'. *Tax Notes International* 38**:** 1109-1119

Carroll, MB (1933) Taxation of Foreign and National Enterprises. Volume 4: Methods of Allocating Taxable Income. . Geneva: League of Nations. Available at http://setis.library.usyd.edu.au/pubotbin/toccer-new?id=cartaxa.sgml&tag=law&images=acdp/gifs&data=/usr/ot&part=0

Coase, RH (1988) *The firm the market and the law.* Chicago, London: University of Chicago Press 1988

Colin, N and Collin, P (2013) Mission d'expertise sur la fiscalité de l'économie numérique. Paris: Ministère des Finances et de l'Economie.

Drucker, J (2010) Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes. *Bloomberg.* 21st October. http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html

Drucker, J (2012) Google Revenues Sheltered in No-Tax Bermuda Soar to $10 Billion. 10th December. Bloomberg, http://www.bloomberg.com/news/2012-12-10/google-revenues-sheltered-in-no-tax-bermuda-soar-to-10-billion.html .

Fleming, J. C., Peroni, R.J. and Shay, S.E. (2009) Worse than Exemption. *Emory Law Journal* 59**:** 79-149.

India v. Azadi (2003) *Union of India a.o. v. Azadi Bachao Andolan and Shiv Kant Jha*. Supreme Court of India, S.L.P.(C) Nos.20192-20193 of 2002.

Keuschnigg, C and Devereux, MP (2012) `The arm's length principle and distortions to multinational firm organization'. *Journal of International Economics* 89: 432–440.

Kleinbard, E. D. (2011a) Stateless Income. *Florida Tax Review* http://ssrn.com/paper=1791769

Kleinbard, E. D. (2011b) The Lessons of Stateless Income. *Tax Law Review* http://ssrn.com/paper=1791783

League of Nations (1932) Taxation of Foreign and National Enterprises. A study of the tax systems and methods of allocation of the profits of enterprises operating in more than one country. Volume I (France, Germany, Spain, the U.K. and the U.S.A.). No. C.73.M.38, 1932 II A 3 Geneva: League of Nations.

League of Nations (1933a) Taxation of Foreign and National Enterprises. Studies of the tax systems and methods of allocation of the profits of enterprises operating in more than one country.Vol. II (Austria, Belgium, Czechoslovakia, Free City of Danzig, Greece, Hungary, Italy, Latvia, Luxemburg, Netherlands, Roumania and Switzerland). C.425(b).M.217(b).1933.II.A. Geneva

League of Nations (1933b) Taxation of Foreign and National Enterprises. Studies of the tax systems and methods of allocation of the profits of enterprises operating in more than one country.Vol. III (British India, Canada, Japan, Mexico, Netherlands East Indies, Union of South Africa, States of Massachusets, of New York, and of Wisconsin). No. C.425 (a). M.217(a). 1933 II. Available at http://archive.org/details/taxationofforeig031922mbp

OECD (2000) *Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article 5.* Committee on Fiscal Affairs.

OECD (2005) *E-commerce: Transfer Pricing and Business Profits Taxation.* OECD Tax Policy Studies No. 10 .

OECD (2006) *Attribution of Profits to Permanent Establishments.* Paris: OECD-CFA

OECD (2008) *Report on the Attribution of Profits to Permanent Establishments*. Committee on Fiscal Affairs

OECD (2010) *2010 Report on Attribution of Profits to Permanent Establishments.* Committee on Fiscal Affairs

OECD (2010) *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Paris: OECD.

OECD (2013) *Addressing Base Erosion and Profit Shifting*. February. Paris: OECD

OECD (2013b) *Action Plan on Base Erosion and Profit Shifting*. August. Paris: OECD.

OECD (2013c) *Revised Discussion Draft on Transfer Pricing Aspects of Intangibles*. Paris: OECD.

Parillo, KA and Trivedi, S (2013) U.S. Competent Authority Has Harsh Words About India. *Worldwide Tax Daily,* 4th Feb.

Picciotto, S (1992) *International Business Taxation.* London: Weidenfeld & Nicolson. Available from http://www.taxjustice.net/cms/front_content.php?idcat=149

Picciotto, S. (2013a) *Is the International Tax System Fit for Purpose, especially for Developing Countries?* International Centre for Tax and Development, Working Paper 13.

Picciotto, S. (2013b) `Can the OECD Mend the International Tax System?'. *Tax Notes International*, forthcoming (September).

Right Florist (2013) *Income Tax Officer v. Right Florist PVT Ltd*. ITA 1336/Kol./ 2011. Income Tax Appellate Tribunal, Kolkata B Bench.

Sandell, J (2012) `The Double Irish and the Dutch Sandwich: How Some U.S. Companies Are Flummoxing the Tax Code'. *Tax Notes International* 67: 867-78.

Sheppard, LA (2012) Is Transfer Pricing Worth Salvaging? *Worldwide Tax Daily.* 30th July, 384-393.

Sullivan, MA (2004) With billions at Stake, Glaxo puts U.S. APA Program on Trial. *Tax Notes International* 3 May. 34**:** 456-463.

Tanzi, V (1999) Is There a Need for a World Tax Organization? In Razin, A and Sadka, E (eds) *The Economics of Globalization: Policy Perspectives from Public Economics*. New York: Cambridge University Press.

Tax Justice Network (2007) *Identifying Tax Havens and Offshore Financial Centres*.

UN (2012). *Practical Manual on Transfer Pricing for Developing Countries*. United Nations. Available at http://www.un.org/esa/ffd/tax/documents/bgrd_tp.htm

US General Accounting Office (1981) *IRS Could Better Protect US Tax Interests in Determining the Income of Multinational Corporations*. Report of the Comptroller-General to the Chairman, House Committee of Ways and Means, GGD-81-81.

US Treasury Department & Internal Revenue Service (1988) *A Study of Intercompany Pricing*. Discussion draft (The White Paper).

US Congress (2013) *Options for Taxing US Multinational Corporations.* Congressional Budget Office.

Vijayaraghavan, V. (2012) The Great Indian Transfer Pricing Circus - A Critical View of Indian TP Provisions. *Tax Justice Focus* 7**:** 7-9

Wittendorff, J (2013) At Arm's Length: Aggregation of Transactions in Transfer Pricing -- Glaxo and Other Cases. *Worldwide Tax Daily* 14th January.