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FULL TAXATION: THE SINGLE TAX EMPEROR'S NEW CLOTHES

by

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ABSTRACT

It has recently been argued in the international tax literature that the OECD Base Erosion and Profit Shifting project (BEPS) reflects and effectuates full taxation, namely an international norm that would suggest that all of a company's income should be taxed in places where it has real business activities, representing a modern approach to the single-taxation paradigm. This Article builds upon the concept of full taxation and argues that although rhetorically attractive, the concept is still conceptually inconsistent, particularly because it is incapable of providing any hints as regards where and who should finally be taxed. Moreover, it adopts an overinclusive and instrumental approach, the

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purpose of which appears to be only to legitimatise the use of coordinated provisions whose rationale attends exclusively to avoid the complete absence of taxation in cross-border transactions. This approach, innocuous at first sight, suggests however the unprincipled purpose of taxation just for the sake of taxation, putting at risk countries wishing to attract real economic activities and stigmatising the outcome of double non-taxation in a permanent way.

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I. Introduction

It has recently been argued in the international tax literature that the OECD Base Erosion and Profit Shifting project (BEPS) reflects and effectuates *full taxation*, namely an international norm that would suggest that all of a company's income should be taxed in places where it has real business activities, ultimately representing a modern approach to the single-taxation paradigm.[1] This Article builds upon this concept

1. Ruth Mason, *The Transformation of International Tax*, 114 Am. J. Int'l L. 353 (2020) (original proposal for the concept of "full taxation," arguing also that BEPS has served as the engine to expand the international tax agenda, bringing countries together in apparent equal footing to achieve global consensus on tax matters)*; see also* Itai Grinberg, *The New International Tax Diplomacy*, 104 Geo. L.J. 1137 (2016) (stressing the influence of

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and argues that although rhetorically attractive, *full taxation* is still conceptually inconsistent, particularly because it is incapable of providing any hints as regards *where* and *who* should finally be taxed.[2] Moreover, it adopts an overinclusive and instrumental approach, the purpose of which appears to be only to legitimatise the use of coordinated provisions whose rationale exclusively attends to avoiding the complete absence of taxation in cross-border transactions.[3] This

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BEPS in the shaping of international tax governance); Shay Moyal, *Back to Basics: Rethinking Normative Principles in International Tax*, 73 Tax Law. 165 (2019) (arguing for a broader interpretation of single taxation in order to set a minimum effective tax rate); Noam Noked, *Defense of Primary Taxing Rights*, 40 Va. Tax Rev. 341, 356 (2021) (arguing for a "Defensive 'Primary Taxing Rights' Tax," which would follow the full taxation approach proposed by Ruth Mason).

In contrast to the optimistic view of BEPS, see, for example, Yariv Brauner, *BEPS: An Interim Evaluation*, 6 World Tax J., Feb. 2014, at 10, 37 (concluding that BEPS "seems to be about everything to do with international tax and nothing to do with it at the same time"); Yariv Brauner, *What the BEPS?*, 16 Fla. Tax Rev. 55 (2014) (criticising some BEPS actions for not promoting a collaborative process, although recognizing the multilateral instrument as the most important achievement from BEPS); Allison Christians, *BEPS and the New International Tax Order*, 2016 BYU L. Rev. 1603, 1603 (arguing that what BEPS will achieve will be nothing else than reinforcing the monopoly of a small group of rich countries that "created the tax avoidance problem to begin with"); Michael P. Devereux & John Vella, *Are We Heading Towards a Corporate Tax System Fit for the 21st Century?*, 35 Fiscal Stud. 449, 462 (2014) (arguing that framing the BEPS project into avoiding "double non-taxation . . . suggests a focus on the symptoms of the [] regime and not the structure of the regime itself"); Mindy Herzfeld, *The Case Against BEPS: Lessons for Tax Coordination*, 21 Fla. Tax Rev. 1, 1 (2017) (arguing that the BEPS project left the international tax system "even more broken than before").

See *infra* Part II.A for a brief explanation of the notion of "single taxation."

2. Mason fully acknowledges some of the inconsistencies of the concept of *full taxation* that she identifies in BEPS, in particular its indeterminism. In Mason's words, "the concepts of full taxation and double taxation are indeterminate—there is no way to specify the tax base or rate that would satisfy them." Mason, *supra* note 1, at 385. For a detailed analysis, see *infra* Part III.B.1.

3. Mason denominates these type of provisions as "fiscal fail-safe" provisions. Mason, *supra* note 1, at 376–80.

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approach, innocuous at first sight, suggests, however, the unprincipled purpose of taxation just for the sake of taxation, putting at risk countries wishing to attract real economic activities and stigmatising the outcome of double non-taxation in a permanent way.

Part II briefly analyses the origins of single taxation and how this notion—inconsistent in itself—is embraced by BEPS. Part III analyses the concept of *full taxation*, arguing that although rhetorically attractive, the concept is still conceptually inconsistent. The analysis reinforces the view of some commentators that *full taxation* is agnostic in regards to the tax base and the tax rate that one should look at when determining that all company's income should be taxed, and stresses additional risks associated to its indeterminism.[4] This Part also argues that *full taxation* reflects an overinclusive and instrumental approach, the purpose of which appears to be solely to legitimise provisions under which if one country does not impose taxation, another country automatically pulls the trigger and does it, ultimately suggesting the unprincipled purpose of taxation just for the sake of taxation. Part IV argues against the idea of *full taxation* being recognised as a new international tax norm from a strict international law perspective. Indeed, no international law provision prohibits *full taxation*. Nor could *full taxation* be considered international custom. However, it is perhaps too early to venture a definitive answer in this regard, especially considering the dynamics of international custom. Part V concludes.

II. The Single-Taxation Paradigm

Single taxation has captivated both policymakers and academics for good reasons. After all, the idea is simplistically seductive: if income resulting from cross-border transactions is taxed exactly once—but no more and not less than once—both double taxation and double non-taxation are prevented. This Part analyses the origins of the single-taxation paradigm and how the notion of single taxation—inconsistent in itself—is officially embraced by BEPS. It also argues that the conceptual frustration behind the notions of double taxation and double non-taxation seems to be the only apparent engine that gave origin to the ideal of an international single-tax system.

4. *Id.* at 385.

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A. The Origin

The academic theory of single taxation first came about in the late 1990s.[5] At that time, Reuven Avi-Yonah defended—not without scholarly resistance—the idea of an international tax regime, which would basically consist of the bilateral tax treaty network and the domestic tax laws of the major trading nations, [6] also forming part of customary international law.[7]

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5. Of course, the idea of taxing only once is much older than this, and it was explicitly recognised in the commentary to the first model treaty elaborated by the League of Nations Committee of Technical Experts in 1927, which says: "The most elementary and undisputed principles of fiscal justice, therefore, required that the experts should devise a scheme whereby all incomes would be taxed once, and once only." Hugh J. Ault, *Some Reflections on the OECD and the Sources of International Tax Principles*, 70 Tax Notes Int'l 1195, 1195 (June 17, 2013) (citing *Report Presented by the Comm. of Technical Experts on Double Taxation and Tax Evasion*, League of Nations Doc. C.216.M.85 1927 II, at 23 (1927)); *see also* Reuven S. Avi-Yonah, *Who Invented the Single Tax Principle?: An Essay on the History of U.S. Treaty Policy*, 59 N.Y.L. Sch. L. Rev. 305, 310 (2014/15) (citing the same paragraph in the report of the League of Nations Committee of Technical Experts).

6. The academic debate regarding the existence of an "international tax regime" started with the David R. Tillinghast Lecture on international tax arbitrage and the international tax regime held at N.Y.U. in 1998. In particular, the speaker discussed whether exploiting differences between the tax systems of two jurisdictions to minimize the taxes paid could be considered a problem, and if so, whether something could be done without a centralized international tax organization. H. David Rosenbloom, David R. Tillinghast Lecture, *International Tax Arbitrage and the "International Tax System,"* 53 Tax L. Rev. 137, 140 (2000) (concluding that international tax arbitrage would be the natural response of the taxpayers to the normal differences that exist between the tax systems around the world)*; see also* Michael J. Graetz, David R. Tillinghast Lecture, *Taxing International Income: Inadequate Principles, Outdated Concepts and Unsatisfactory Policies*, 54 Tax L. Rev. 261 (2001); Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 Geo. L.J. 543 (2001). However, Avi-Yonah made a previous reference to the international tax regime in 1997 too. *See* Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 Tax L. Rev. 507 (1997).

7. Despite the academic and practical importance of this question, just a few attempts to study the formation of customary law can be found in

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The pillars of this regime would be two basic principles: the *single tax principle*, which argues that income should be taxed once—no more and not less—and the *benefit principle* which means that active business income must be taxed primarily at source and passive investment income primarily at residence.[8] Therefore, Avi-Yonah's single tax idea appears to be accompanied by a distribution rule—the *benefit principle*—which suggests that single taxation implicates not only that income is taxed but also where that income should be taxed.[9] Single taxation and the "benefit principle" combined would provide the comfortable idea of an international tax regime.[10]

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the international tax literature. *See* Chantal Thomas, *Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method*, 14 Berkeley J. Int'l L. 99 (1996); *see also* Brian D. Lepard, *Is the United States Obligated to Drive on the Right? A Multidisciplinary Inquiry into the Normative Authority of Contemporary International Law Using the Arm's Length Standard as a Case Study*, 10 Duke J. Compar. & Int'l L. 43 (1999). For a brief analysis of *full taxation* in light of international custom, see *infra* Part IV.B.

8. Reuven S. Avi-Yonah, International Tax as International Law: An Analysis of the International Tax Regime 8–13 (2007).

9. However, Avi-Yonah has recognized the obsolescence of the benefit principle arguing that, at least "temporarily," this principle should be re-evaluated and be understood in a complete opposite way. In Avi-Yonah's words: "Most of the current issues can be solved if we taxed passive income primarily at source and active income primarily at residence." Reuven S. Avi-Yonah, *The International Tax Regime: A Centennial Reconsideration*, 1 Glob. Tax'n, June 2016, at 17, 28.

10. Although the idea of an international tax regime disregards the basic premise in taxation stating that taxing and spending are still matters of domestic tax policy, important international tax scholars have supported the idea of its existence. In support of this idea, see, for example, Hugh J. Ault, *The Importance of International Cooperation in Forging Tax Policy*, 26 Brook. J. Int'l L. 1693 (2001); Yariv Brauner, *Integration in an Integrating World*, 2 N.Y.U. J.L. & Bus. 51 (2005); Yariv Brauner, *An International Tax Regime in Crystallization*, 56 Tax L. Rev. 259 (2003). For a contrast, see, for example, Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 26 Brook. J. Int'l L. 1357 (2001); Mitchell A. Kane, *Strategy and Cooperation in National Responses to International Tax Arbitrage*, 53 Emory L.J. 89 (2004); Roin, *supra* note 6; H. David Rosenbloom, *Cross-Border Arbitrage: The Good, the Bad and the Ugly*, 85 Taxes 115 (2007); Rosenbloom, *supra* note 6.

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Therefore, from a theoretical perspective, single taxation (or the single tax principle, as its creator denominates it) would avoid income being overtaxed, as well as undertaxed or not taxed at all, resting always in the assumption that all the countries would maintain both a personal and a corporate income tax.[11]

B. Single Taxation and BEPS

The single-tax notion is officially endorsed in BEPS, although with a switch in priorities from avoiding double taxation to avoiding double non-taxation,[12] challenging the fundamental consistency of the single-tax notion.[13] Consider the example of the OECD anti-hybrid rules (*linking rules*) proposed in the OECD BEPS Action 2.[14] These rules recognise

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11. Avi-Yonah, *supra* note 8, at 3–4.

12. Mason also recognises this switch in priorities, arguing that countries in the past (before BEPS) engaged in international cooperation mainly to reduce transaction costs by preventing double taxation. However, the over-completion of this norm helped accommodate nontaxation. This is why Mason suggests that countries not only support a "no-double-tax norm," but what she denominates "full taxation." Mason, *supra* note 1, at 370. For the analysis of the concept of *full taxation*, see *infra* Part III.

13. The BEPS Action Plan clearly states: "BEPS relates chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation. It also relates to arrangements that achieve no or low taxation by shifting profits away from jurisdictions where the activities creating those profits take place." OECD, *Action Plan on Base Erosion and Profit Shifting* 10 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [https://perma.cc/JV2G-PAY3] [hereinafter OECD, *Action Plan*]. However, such an endorsement is only conditional, without considering no or low taxation as a *per se* cause of concern. It is only a concern when this outcome is associated with artificial practices. In other words, and contrary to a pure idea of single taxation, the prevention of double non-taxation is contingent on the fact that artificial (abusive) structures are used to achieve it. In the words of the same BEPS report: "[n]o or low taxation is not *per se* a cause of concern, but it becomes so when it is associated with practices that artificially segregate taxable income from the activities that generate it," which is taxing where factors of production are located (or where value is created). *Id.*

14. OECD, *Neutralising the Effects of Hybrid Mismatch Arrangements, Action 2: 2015 Final Report* (2015), https://doi.org/10.1787/9789264241138-en [https://perma.cc/LU7P-K69Q] [hereinafter OECD, *Action 2 Final Report*]. For an in-depth analysis on issues related to hybrid entities and BEPS, see Leopoldo

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that taxpayers make use of disparities in countries' tax characterisations of financial instruments or entities to create hybrid instruments[15] or hybrid entities[16] that might result in no or low taxation.[17] BEPS Action 2

Parada, Double Non-Taxation and the Use of Hybrid Entities: An Alternative Approach in the New Era of BEPS (2018).

15. Hybrid financial instruments are instruments that combine both debt and equity characteristics, which are indeed the two traditional ways of financing companies. In a strict cross-border context, they arise due to the different tax qualification (debt or equity) that a single financial instrument receives in more than one jurisdiction. *See* Jakob Bundgaard, Hybrid Financial Instruments in International Tax Law 3 (2017); *see also* Leopoldo Parada, *Is It Debt or Is It Equity? The Problem with Using Hybrid Financial Instruments*, 74 Tax Notes Int'l 347 (Apr. 28, 2014) (explaining that hybrid financial instruments play a long-standing and important role in international businesses since a long time ago, especially as regards the raise of capital in a cost-efficient manner); Wolfgang Schön et al., *Debt and Equity in Domestic and International Tax Law—A Comparative Policy Analysis*, 2014 Brit. Tax Rev. 146 (2014).

16. Hybrid entity structures should be understood as including both hybrid entities and reverse hybrid entities. Generally speaking, a hybrid entity shall be understood as an entity that is considered to be a taxable entity in the country of its establishment, that is, an entity that is different from its owners and is subject to corporate income tax in its country of organisation, while in the other country the same entity is regarded as tax or fiscally transparent; that is, there will be no taxation at the level of the entity but rather at the level of the partners. In contrast, a reverse hybrid entity is an entity that is treated as tax transparent in the country of its establishment but considered a taxable entity in the other country. For a deeper analysis on this topic, see Parada, *supra* note 14, at 115–18.

17. For example, due to the different tax qualification of the same financial instrument in two states (as debt or equity), a deduction for the interest payments associated with that instrument will be granted in the state of the subsidiary but without a corresponding inclusion of income in the state of the parent company. In the latter state, the payments will be treated as equity and generally subject to a participation exemption. The result of this transaction—deduction/non-inclusion of income—is economically equivalent to double non-taxation. *See* Leopoldo Parada, *Hybrid Financial Instruments and Anti-Hybrid Rules in the EU ATAD (Article 9 ATAD)*, *in* A Guide to the Anti-Tax Avoidance Directive 200, 204–06 (Werner Haslehner et al. eds., 2020). Similarly, if two countries do not agree on the tax characterisation of the payor (subsidiary), a deduction will be granted in the state of the subsidiary, but no corresponding inclusion of income will occur in the state of

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puts in place a pragmatic solution that does not attend to the disparities themselves[18] but rather to the tax outcomes generated by them, especially double non-taxation.[19] Indeed, the rules have two parts. First, they provide that if a deductible payment is not recognised as ordinary income in the recipient state, a deduction should be denied in the payor state. This is technically known as the *primary response*.[20] Similarly, if for any reason the payor state did not react by denying such a deduction, the recipient state could tax what, in principle, was not taxable under the domestic rules in the recipient state. This is what is known as the *defensive rule*.[21] In both cases, the underlying assumption is simple: taxation must occur somewhere—but where does not matter.[22]

Nevertheless, and although it is correct to argue that the OECD anti-hybrid rules aim to avoid international double non-taxation, such a consequentialist approach[23] brings to the fore the inconsistencies of the single-tax notion itself, an idea that is far from being a settled principle in international tax law. Let me illustrate this with another example involving again the application of the OECD anti-hybrid rules. Assume a deductible payment of interest coming from a subsidiary to its parent company due to a loan transaction between the two entities. The deduction of the interest payment is denied in Year 1 because the interest

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the parent company, where the same subsidiary is considered as tax transparent. Again here, the result of deduction/non-inclusion of income is economically equivalent to double non-taxation. *See* PARADA, *supra* note 14, at 291–99 (giving examples of both transactions involving hybrid and reverse hybrid entities).

18. Both hybrid financial instruments and hybrid entities imply that two countries do not agree in the characterization of the same instrument or entity. This is indeed the "disparity" that generates the deduction/non-inclusion outcome or double non-taxation. *See supra* notes 15–16.

19. Leopoldo Parada, *Hybrid Entity Mismatches and the International Trend of Matching Tax Outcomes: A Critical Approach*, 46 INTERTAX 971, 976 (2018) (considering the priority of outcomes over disparities as well as the excessive international focus on double non-taxation as "consequentialist").

20. OECD, *Action 2 Final Report*, *supra* note 14, at 17.

21. *Id.* at 52.

22. Parada, *supra* note 19, at 992 (arguing that "the assumption that income should be taxed somewhere––no matter where" has convinced many scholars to expand the scope of the concern over hybrids outside the scope of disparities, which is indeed its core).

23. *Id.* at 976–79.

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payment is not recognised as income in the recipient state in Year 1 because the country of the parent company considers the payor entity as transparent for tax purposes.[24] However, in Year 2, the inclusion of income occurs because of an inclusion-timing difference. As the rule denying the deduction of the interest payment does not provide any tool to undo the disallowance of the deduction in Year 1, the ultimate outcome will be economic double taxation.[25] In other words, avoiding double non-taxation in this case may result in the absurdity of creating new situations of double taxation, that is, a flagrant violation of the same principle that these provisions aim to protect.[26]

Moreover, in most of the cases involving a double non-tax outcome, what we really have is a one-year deferral; that is, non-taxation

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24. Countries often do not agree on their domestic rules to characterise entities for tax purposes, as they have sovereignty to decide on these and other tax rules as well. PARADA, *supra* note 14, at 118–29 (summarising in five groups the different tax characterisation rules around the world, including a comparative approach, legal personality approach, overall approach, fixed approach, and elective approach).

25. Technically speaking, this could be avoided if the OECD linking rules were applied after interest limitation rules, particularly after the primary response. For this proposal, see Leopoldo Parada, *The Interplay Between Interest Limitation Rules and Anti-Hybrid Rules: Inverting the Paradigm*, *in* CORPORATE TAXATION, GROUP DEBT FUNDING AND BASE EROSION: NEW PERSPECTIVES ON THE EU ANTI-TAX AVOIDANCE DIRECTIVE 209 (Gianluigi Bizioli et al. eds, 2020) (arguing that changing the application priority of the rules could solve the economic double taxation issues generated by the OECD linking rules).

26. However, some may argue that the economic double taxation outcome here is just a sunk cost of preventing economic double non-taxation in a sort of "poetic justice" to punish companies that are largely benefiting from non-taxation. Christoph Marchgraber, *Tackling Deduction and Non-Inclusion Schemes—The Proposal of the European Commission*, 54 EUR. TAX'N, Apr. 2014, at 133, 142 (using the term "poetic justice" to stress the idea of taxing companies that have benefitted from double non-taxation); *see also* Ault, *supra* note 5, at 1199 (recognizing the irony here when he says "[b]ut now, finally awakening to the problems of double nontaxation, in creating solutions to these problems, we run back into issues of potential double taxation"); Parada, *supra* note 17, at 227–28 (arguing that such a justification would be unsatisfactory from a tax policy perspective, especially because it would deviate from the true issue regarding hybrid mismatches, i.e., the different tax characterization of entities or instruments).

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seems to be in the end more apparent than real.[27] Let me illustrate that using the same example as before but adding two additional facts. First, the subsidiary holds a sub-subsidiary in the same country. Second, the subsidiary and the sub-subsidiary are part of the same tax group.[28] Now, let us assume that in Year 1 the subsidiary pays interest to the parent and the sub-subsidiary generates income from other sources of the same amount.[29] That is, disregarding anything else and looking at the single picture in Year 1, it is evident that the subsidiary will benefit from deducting the amount of interest paid, which will not be included as income in the parent company due to the tax transparency treatment of the subsidiary in the country of the parent. A double non-tax outcome will certainly arise.

However, if we now consider that in Year 2 the subsidiary pays no interest but has income in the same amount of interest paid in Year 1, the result will be that this income will be taxed twice, once in the state of the subsidiary and once in the state of the parent, assuming of course that no tax credit applies.[30] In other words, just adding an additional calendar year to our analysis may dramatically change our original "non-tax perception," making it disappear but under the cost of accepting double taxation in Year 2. Once again, the paradox

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27. Parada, *supra* note 19, at 978 (arguing that "a one-year deferral is put on equal footing as a permanent double non-taxation outcome"). Similarly, Marchgraber argues:

> [N]ot all situations where something remains untaxed are necessarily problematic. . . . But even with regard to those scenarios of alleged double non-taxation that are considered to be problematic from a tax policy perspective, referring to the phenomenon of double non-taxation is not in itself sufficient to prove that there is a legal problem. . . . Hence, the term double non-taxation seems to be legally inexistent.

Christoph Marchgraber, Double (Non-)Taxation and EU Law 13 (2018).

28. These assumptions are taken from Jürgen Lüdicke, "*Tax Arbitrage" with Hybrid Entities: Challenges and Responses*, 68 Bull. Int'l Tax'n, June/July 2014, at 309, 317.

29. See a similar example in Parada, *supra* note 14, at 292–94.

30. Lüdicke, *supra* note 28, at 314.

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is that protecting single taxation cannot be done without violating single taxation.

Things become even more bizarre if one considers the reality of withholding taxes in cases involving hybrids and the OECD BEPS. Let's take again the simple example of a subsidiary paying interest to its parent company due to a loan transaction between the two entities. Whilst the subsidiary is considered in its country of establishment as a taxable entity, the same entity is regarded as tax transparent in the country of the parent company. Therefore, the interest paid will be deducted in the payor country but not recognised as income in the recipient country, generating double non-taxation and raising a concern for the single-tax paradigm. Such concern should, however, disappear if a withholding tax is applied on the amount of interest before crossing the border.[31] After all, the interest payments will be taxed once.

Although this approach appears to follow the logic of single taxation—taxing somewhere, at least once—the OECD's opinion is rather different. As stated by the OECD in the OECD BEPS Action Plan 2: "The function of withholding taxes under the laws of the payer jurisdiction is generally not to address mismatches in tax outcomes and a payment should not be treated as included in ordinary income simply because it has been subject to withholding at source."[32] This statement is not only unsatisfactory but clearly incoherent. Indeed, if one considers that a withholding tax is economically supported at the level of the creditor (payee), there is certainly no logical reason—from a single-tax perspective—to exclude withholding taxes from the concept of inclusion as ordinary income.[33] Interestingly, the fact of denying the deduction of a payment, but still subjecting the payment to a withholding tax, will be economically equivalent to double taxation. That is, we come back again into the paradoxical circular effect that ensuring single taxation ultimately suggests.

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31. Parada, *supra* note 19, at 982. For this opinion, see also Graeme S. Cooper, *Some Thoughts on the OECD's Recommendations on Hybrid Mismatches*, 69 Bull. Int'l Tax'n, June/July 2015, at 334, 348 (arguing that, for example, in Australia a dividend on a non-equity share paid by an Australian company is likely to be subject to withholding tax at source, offsetting the deduction from the Australian tax base).

32. OECD, *Action 2 Final Report*, *supra* note 14, at 127.

33. Parada, *supra* note 19, at 982.

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C. The Conceptual Frustration of Double Taxation and Double Non-Taxation

There are plenty of examples similar to the ones described above,[34] which do not only challenge the notion of single taxation itself but also put on evidence of a more fundamental issue, which is the conceptual frustration behind both the concepts of double taxation and double non-taxation.

Almost all scholars, policymakers, and individuals with some curiosity about international tax law have at least once argued the importance of avoiding double taxation—that is, the idea that income should not be taxed more than once in any cross-border transactions.[35] The question is "why?" That is, why should we care about how many times a tax is imposed when the concern should simply be "how much" tax is ultimately paid? For example, taxing once at a rate of 70% could raise confiscatory concerns, a conclusion that will not change because the tax is applied 70 times at a 1% rate on the same amount of income. Whilst the former cannot be considered double or multiple taxation, the latter will. However, at the end of the day, 70% of the total income must be paid, proving that whilst *how much* is an important question, *how many times* is indeed irrelevant.[36] As Daniel Shaviro explains it clearly: "What matters about taxes is the burden[] they impose, not how many times they are separately (as a formal matter) levied. Thus, most of us would rather be taxed twice at a 15%

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34. For other examples involving hybrid and reverse hybrid entities, see Parada, *supra* note 14, at 292–94.

35. However, some have also challenged the double taxation mantra, particularly as being the purpose of double tax conventions. *See* Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. Int'l L. & Pol. 939 (2000) (arguing that the idea that tax treaties exist primarily to alleviate double taxation has its origin in the false premise that countries would not be able to alleviate double taxation without such treaties); *see also* Julia Braun & Martin Zagler, *An Economic Perspective on Double Tax Treaties with(in) Developing Countries*, 6 World Tax J., Oct. 2014, at 242 (arguing that it is widely accepted that the capacity of tax treaties to mitigate or eliminate double taxation is rather limited).

36. Daniel Shaviro, *The Crossroads Versus the Seesaw: Getting a "Fix" on Recent International Tax Policy Developments*, 69 Tax L. Rev. 1, 6 (2015).

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rate than once at a 40% rate."[37] Moreover, one should not forget recognising that, in some cases, the relief from double taxation seems not to be a problem at all, as it happens with developing countries or transition economies where residents are expected to receive less income from foreign sources.[38]

Double non-taxation is not less frustrating either, and the reasons are varied.[39] First, and strictly speaking, double non-taxation is just the conceptual opposite of double taxation. That is, whilst double taxation arises from the exercise of sovereign taxing rights of two or more countries, double non-taxation is a consequence of the opposite, and it occurs when no country exercises its sovereign taxing rights. That can happen either because a state decides to exempt foreign sourced income not taxed somewhere else, or because a double tax treaty assigns exclusive taxing rights that are not domestically exercised.[40] In this regard, double non-taxation—or just non-taxation—is incapable of explaining outcomes whose results are practically the same but without achieving a complete absence of taxation. Some of these outcomes might be (or not) well-connected with abusive practices, but, attending to the strict conceptual classification, they are not double non-taxation.[41]

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37. *Id.*

38. Richard J. Vann, *International Aspects of Income Tax*, *in* 2 TAX LAW DESIGN AND DRAFTING 718 (Victor Thuronyi ed., 1998) (arguing that as residents of these countries are expected to receive less income from foreign sources, the relief of double taxation is not a priority).

39. For an attempt to understand the concept of double non-taxation in a systematic way, see PARADA, *supra* note 14, at 13–51; *see also* MARCHGRABER, *supra* note 27.

40. In the indirect tax field, the conclusion is similar. *See, e.g.*, Axel A. Verstraeten, *Double (Non-)Taxation in VAT and Direct Taxes: Which Tax Is Better for Developing Countries?*, *in* VALUE ADDED TAX AND DIRECT TAXATION: SIMILARITIES AND DIFFERENCES 369, 378 (Michael Lang et al. eds., 2009).

41. PARADA, *supra* note 14, at 17–19.

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In this context, it is not surprising that public opinion[42] as well as some commentators promoting concepts such as *tax justice*[43] and *fairness*[44] have helped frame the concept of double non-taxation in a negative way.[45] A similar role has been played by the emergence of pseudo-legal concepts, such as the slippery notion of "aggressive tax

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42. Allison Christians, *Avoidance, Evasion, and Taxpayer Morality*, 44 WASH. U. J.L. & POL'Y 39, 52 (2014) (quoting James Henry, an American tax justice activist, who said in 2012: "Both evasion and avoidance have the same impact on the rest of us, which is, our tax burdens are greater because the truly rich are not paying their fair share: they are able to put their money abroad, and basically are able to take advantage of a system that allows a double non-taxation. And that's a real problem.").

43. For an analysis of the concept of justice in international tax law, see, for example, PETER HONGLER, JUSTICE IN INTERNATIONAL TAX LAW: A NORMATIVE REVIEW OF THE INTERNATIONAL TAX REGIME (2019); *see also* Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399 (2005).

44. For the analysis of the concept of "tax fairness," see, for example, Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1323 (2008) (arguing that horizontal equity is a special aspect of the revenue function in taxation, and it "may be justified by welfare gains from a shared agreement to leave certain controversial questions of distributive justice undecided during the revenue-raising process"); *see also* Allison Christians, *Fair Taxation as a Basic Human Right*, 9 INT'L REV. CONSTITUTIONALISM 211 (2009) (exploring how human rights principles might overcome some of the limitations of existing tax policy discourse); J. Clifton Fleming, Jr. et al., *Fairness in International Taxation: The Ability-to-Pay for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 354 (2001) (arguing that "the fairness criterion supports the conclusion that taxing worldwide income and ending the deferral privilege provides a tax regime that is superior to either the current [U.S. international income tax] system or the adoption of an exemption system").

45. This can also be seen in the legal distinction between objectionable and non-objectionable tax avoidance. In this regard, Allison Christians has convincingly argued that the turn to morality––rather than law—to delineate what is legal or illegal is indeed counterproductive to pursuing a coherent tax policy in the long term, and it can also have "grave consequences for the future of tax policy on a global scale." Christians, *supra* note 42, at 39–40; *see also* Allison Christians, *Tax Activists and the Global Movement for Development Through Transparency*, *in* TAX, LAW AND DEVELOPMENT 288 (Yariv Brauner & Miranda Stewart eds., 2013); PARADA, *supra* note 14, at 50–51.

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planning," which finds its foundational pillar in the also slippery notion of "unintended double non-taxation."[46] Conceptually speaking, however, not taxing twice is as irrelevant as taxing twice.[47]

Second, double non-taxation is an outcome that can be potentially achieved by abusive or even illegal practices, increasing the levels of confusion and frustration as regards income remaining untaxed. For example, a tax evader could easily achieve non-taxation altogether when he consciously decides to break the laws of one or more jurisdictions by not declaring assets or income. Similarly, an artificial tax structure can be set up to achieve non-taxation too. However, the foregoing does not mean that double non-taxation is either a proxy or a presumption of tax evasion or tax avoidance.[48] Indeed, what is sanctioned in tax evasion cases is not that a taxpayer has achieved non-taxation altogether, but rather that he unlawfully concealed assets from the tax authorities in order to reduce his final tax burden, probably to zero.[49] In other cases related to tax avoidance, the absence of abusive elements reduces the outcome of double non-taxation to an indeed legitimate result, as might be the case for non-abusive structures.

For instance, let us assume a subsidiary located in state *X* pays royalties to its parent company located in state *Y* for the use of intangibles. There is also a double tax convention in force which states that royalties paid from *X* to *Y* will only be taxable in state *Y* (the payee

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46. For a further discussion on the notion of "aggressive tax planning," see *infra* Part III.B.2; *see also infra* note 102. For the concept of "unintended double non-taxation," see, for example, Félix Daniel Martínez Laguna, *Abuse and Aggressive Tax Planning: Between OECD and EU Initiatives—The Dividing Line Between Intended and Unintended Double Non-Taxation*, 9 World Tax J., May 2017, at 189, 189 (proposing the distinction between "proper double non-taxation and twice non-taxation," arguing that aggressive tax planning would refer only to "twice non-taxation"). For a critical analysis of the term "unintended double non-taxation," see Parada, *supra* note 14, at 19–22 (arguing that the term should be avoided for sake of clarity and legal certainty).

47. Interestingly, neither double taxation nor double non-taxation is a prohibited outcome under international law. For a further analysis, see *infra* Part IV.

48. Parada, *supra* note 14, at 36.

49. *Id.*

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state).[50] However, the domestic law of state *Y* prevents any form of tax for royalties. Assuming that no artificial or abusive element gets involved in this transaction—i.e., there is a legitimate payment of royalties for the use of an existing intangible—the double non-taxation outcome is arguably undesirable. On the contrary, one should recognise that it is an optimal outcome from a pure cost perspective.

Even more frustrating is the case of double non-taxation achieved through the use of simple disparities among jurisdictions.[51] Indeed, in most of those cases there will be no element of abuse attached to them but just a mere discrepancy in how to treat for tax purposes a certain transaction, entity, or instrument, ultimately triggering the non-tax result. Tax scholars have not in vain dedicated time and resources to overcome this frustration, which has even been categorised as cross-border or international "tax arbitrage."[52] Yet, neither this nor other legal categorisations have been sufficient to explain why

50. OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017, art. 12 (2017), https://doi.org/10.1787/mtc_cond-2017-en [https://perma.cc/44QR-4YPC] [hereinafter OECD, Model Tax Convention].

51. *See* the discussion of hybrids *supra* Part II.B.

52. Cross-border tax arbitrage (or international tax arbitrage) is understood as the case when a taxpayer is involved in a transaction—or set up a business structure—in order to take advantage of differences among country tax systems in order to duplicate tax benefits and to minimize his overall tax burden. In support of the academic concept of tax arbitrage, see, for example, Reuven S. Avi-Yonah, *Tax Competition, Tax Arbitrage and the International Tax Regime*, 61 Bull. Int'l Tax'n, Apr. 2007, at 130; Luca Dell'Anese, Tax Arbitrage and the Changing Structure of International Tax Law (2006); John Prebble, *Exploiting Form in Avoidance by International Tax Arbitrage—Arguments Towards a Unifying Hypothesis of Taxation Law*, 17 Asia-Pac. Tax Bull., Jan./Feb. 2011, at 8; Tulio Rosembuj, *International Tax Arbitrage*, 39 Intertax 158 (2011). In contrast, for example, see Rosenbloom, *supra* note 10; *see also* Kane, *supra* note 10; Julie Roin, *Taxation Without Coordination*, 31 J. Legal Stud. S61 (2002). For a further analysis on the subject, see, for example, Tim Edgar, *Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage*, 51 Can. Tax J. 1079 (2003); Thomas A. Gresik, *The Taxing Task of Taxing Transnationals*, 39 J. Econ. Literature 800 (2001); Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. Rev. 79 (2002). Particularly interesting is what Daniel Shaviro argues, which is that cross-border tax arbitrage—or what we assume as such—is ultimately no more than a "semantic issue," that is, what metaphorically seems

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countries should be concerned in regard to non-taxation altogether.[53] It appears, therefore, that the conceptual frustration behind the notions of double taxation and double non-taxation is the engine that has driven commentators to insist upon defending an idea—*single taxation*—that might work well in a perfectly closed and principled international tax system but that is far from being consistently applied in practice.

Using a less precise and more intuitive denomination—*full taxation*—commentators argue that the "BEPS states" seem to have adopted the concept, while at the same time, they acknowledge some conceptual difficulties with the term, including its evident

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arbitrage-like. Daniel Shaviro, *Money on the Table?: Responding to Cross-Border Tax Arbitrage*, 3 Chi. J. Int'l L. 317, 322 (2002).

53. One of these legal categorisations is what Kleinbard has denominated "stateless income," that is:

> income derived for tax purposes by a multinational group from business activities in a country other than the domicile of the group's ultimate parent company, but which is subject to tax only in a jurisdiction that is not the location of the customers or the factors of production through which the income was derived, and is not the domicile of the group's parent company.

Edward D. Kleinbard, *Stateless Income*, 11 Fla. Tax Rev. 699, 700 (2011). Therefore, stateless income is a more complex construction that involves the application of a series of international tax norms, including the recognition of separate tax persons, transfer pricing rules, the treatment of income as debt or equity, etc., and whose outcome might or might not be non-taxation altogether. *See* Parada, *supra* note 14, at 19. For further references on this topic, see e.g., Edward D. Kleinbard, *Through a Latte Darkly: Starbucks's Stateless Income Planning*, 139 Tax Notes 1515 (June 24, 2013); Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 Tax L. Rev. 99 (2011); Edward D. Kleinbard, *Stateless Income's Challenge to Tax Policy* (U.S.C. Legal Studies Research Paper No. 11-13, 2011), https://gould.usc.edu/centers/class/class-workshops/usc-legal-studies-working-papers/documents/C11_8_paper.pdf [https://perma.cc/9B4Q-RYKM]. Other authors have used the concept of "white income" to refer to double non-taxation, although without claiming a new legal category. *See, e.g.*, Werner Haslehner, *Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law*, *in* State Aid Law and Business Taxation 133 (Isabelle Richelle et al. eds., 2016).

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indeterminism.[54] However, *full taxation* is more problematic than that and arguably may constitute a new international norm. This is exactly what the rest of this work will attempt to reveal.

III. Full Taxation and the New International Tax Order

This Part turns the analysis to the concept of *full taxation*, arguing that, although rhetorically attractive, this notion is still conceptually inconsistent. In particular, this Part reinforces the view of some commentators that *full taxation* is agnostic in regard to the tax base and the tax rate that one should look at when determining that "all of a company's income should be taxed,"[55] stressing additional risks associated with its indeterminism. Moreover, this Part argues that *full taxation* also adopts an overinclusive and instrumental approach, whose purpose appears to be no other than legitimising provisions under which if one country does not impose taxation, another country automatically pulls the trigger and does it, representing the supremacy of taxation somewhere—no matter where.[56]

A. Full Taxation as an Element of Single Taxation

Full taxation is defined as a "norm that dictates that all of a company's income should be taxed in places where it has real business activities."[57] That is, *full taxation* seems to be a sort of new mantra in international tax law, which does not only include the aim of avoiding double nontaxation—arguably accepted in international tax law[58]—but also whatever other aims that may assimilate to that, including the prevention of profit shifting, closing of loopholes, and even the avoidance of the rather slippery concept of "aggressive tax planning."[59] Therefore, the notion of *full taxation* does not deviate from the unsatisfactory idea of

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54. Mason, *supra* note 1, at 385–88.

55. *Id.*

56. *Id.* at 376–81 (referring to these type of rules as "fiscal failsafe" rules)*; see also* Parada, *supra* note 19 (referring to the idea of taxing somewhere, no matter where in the past).

57. Mason, *supra* note 1, at 370.

58. *Id.* (where Mason recognises that the term "prevention of double nontaxation" is rather "inelegant").

59. *Id.* at 367, 370.

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preventing double non-taxation but rather confirms it and disguises it under a new conceptual denomination.[60]

Unlike other attempts to consolidate the idea of single taxation in the past, *full taxation* is presented as agnostic with regard to the specific distributive rules that should be applicable, demanding only that taxing rights flow to states in which multinationals have real factors of production and real activities, making the concept closer to the prevention of abuse.[61] Additionally, the concept appears to get closer to what was originally intended in the OECD BEPS project, that is, not condemning double non-taxation "*per se* a cause of concern" but only in those cases in which taxpayers would achieve it using artificial structures.[62] Yet, as demonstrated later in this work, this latter idea is just apparent and seems to serve only an instrumental purpose, which is the legitimisation of provisions under which if one country does not impose taxation, another country automatically pulls the trigger and does it.[63]

B. The Inconsistencies of Full Taxation

Taxing the full income of a company—or of an economic group—is rhetorically and, perhaps also, intuitively attractive. However, it is also vague and inconsistent. As argued below, the concept of *full taxation* possesses three main features that accentuate the criticism and its

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60. *Id*. at 372 (arguing that "[b]ecause states already faithfully adhered to the no-double-tax norm, growing acceptance of full taxation as a goal of international tax brings states closer to implementing Reuven Avi-Yonah's 'single-tax principle,' which requires income to be taxed exactly once, no more and no less").

61. Avi-Yonah, for example, suggested not only that income in any cross-border taxation should be taxed once, but indeed he proposed that that active business income is taxed primarily at source and passive investment income is taxed primarily at residence. Avi-Yonah, *supra* note 8, at 8–13. Less than ten years later, however, he declared the obsolescence of his own distributive rule. *See* Avi-Yonah, *supra* note 5.

62. OECD, *Action Plan*, *supra* note 13, at 10.

63. Mason, *supra* note 1, at 376–81 (referring to these rules as "fiscal fail-safes"). For the analysis of the instrumentalist approach of full taxation, see *infra* Part III.B.3.

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objectionable nature, namely indeterminism, overinclusiveness, and instrumentalism.[64]

1. Indeterminism

As already noted, *full taxation* is agnostic as regards the tax base and the tax rate that one should look at when determining that all of a company's income should be taxed.[65] That is, *full taxation* is an indeterminate concept since it does not specify the reference baseline that one should look at in order to conclude that all of a company's income has (or has not) been fully taxed. However, there are some hints that might help in breaking the indeterminism of the concept. For example, the fact that full taxation should define loosely the income of a company (or multinational)—i.e., not specifying the tax base—indirectly suggests that *full taxation* may be something closer to financial accounting income, which is an idea that is not far from reality,[66] but which would

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64. Indeterminism, overinclusiveness, and instrumentalism are not presented here as characteristics that are generally banned from the international tax context. On the contrary, it is perfectly possible that some international tax tools require by their nature to be indeterminate or overinclusive, such as the case of general anti-avoidance provisions. Therefore, they should be understood exclusively in the context of the function and nature of full taxation.

65. Mason, *supra* note 1, at 385–87.

66. The OECD Global Anti-Base Erosion Proposal (GloBE), which is part of the international debate about reforming our international tax system through the establishment of a minimum global level of corporate income taxation, endorses the use of financial accounts for tax purposes. See more about the GloBE proposal at OECD, *Public Consultation Document: Global Anti-Base Erosion Proposal ("GloBE")—Pillar Two*, at 9–16 (2019), https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf [hereinafter OECD, *GloBE*]; *see also* OECD, *Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint* (2020), https://doi.org/10.1787/beba0634-en [https://perma.cc/KWL9-DNDC] [hereinafter OECD, *Tax Challenges*]. For available literature, see, for example, Joachim Englisch & Johannes Becker, *International Effective Minimum Taxation—The GLOBE Proposal*, 11 World Tax J., Nov. 2019, 483; Mindy Herzfeld, *Can GILTI + BEAT = GLOBE?*, 47 Intertax 504 (2019); *see also* Daniel W. Blum, *The Proposal for a Global Minimum Tax: Comeback of Residence Taxation in the Digital Era?: Comment on* Can GILTI + BEAT = GLOBE?, 47 Intertax 514 (2019).

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carry with it its own problematics.[67] Similarly, although we have no certainty as regards the tax rates at which all of a company's income should be reasonably taxed, one might conclude, given the vagueness of the term *full taxation*, that a reasonable tax rate would be any rate that is not zero or too low. This would rest on the idea that income of a company should not be ultimately shifted to tax havens[68] or simply be

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67. There are indeed plenty of questions to be addressed in this regard, ranging from what would be the proper financial standard to be used—International Financial Reporting Standards (IFRS) or U.S. Generally Accepted Accounting Principles (U.S. GAAP)—to whether a blending approach should be taken globally or by an entity-by-entity or country-by-country basis. Opting for one path or the other can definitely affect the effectiveness of the policy aims that are trying to be achieved. *See* Michael P. Devereux et al., *The OECD Global Anti-Base Erosion ("GloBE") Proposal* 3 (2020), https://www.sbs.ox.ac.uk/sites/default/files/2020-02/OECD_GloBE_proposal_report.pdf [https://perma.cc/RWS5-LB5R] (arguing that the use of financial accounts would create a number of problems, as well as only "weakly target[] tax competition," which is one of the tax policy objectives of the GloBE proposal). Interestingly, the European project for Common Consolidated Corporate Tax Base (CCCTB) faced similar problems in finding a common base. In that case, however, they decided to move away from the use of IFRS for tax purposes, precisely due to the theoretical and constitutional challenges that that implied. *See* Judith Freedman, *Financial and Tax Accounting: Transparency and "Truth"* 13–17 (Oxford Legal Studies Research Paper No. 02/2008, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085862 [https://perma.cc/88KH-7NQM]. For an analysis of the CCCTB proposal, see, for example, Jesper Barenfeld, *A Common Consolidated Corporate Tax Base in the European Union—A Beauty or a Beast in the Quest for Tax Simplicity*, 61 BULL. INT'L TAX'N, July 2007, at 258; *see also* Luca Cerioni, *The Commission's Proposal for a CCCTB Directive: Analysis and Comment*, 65 BULL. INT'L TAX'N, Sept. 2011, at 515.

68. The notion of "tax haven" is nonetheless cloudy and arbitrary. For an attempt to clarify it, see, for example, Dhammika Dharmapala & James R. Hines, Jr., *Which Countries Become Tax Havens?*, at abstract (Nat'l Bureau of Econ. Rsch., Working Paper No. 12802, 2006), https://www.nber.org/papers/w12802 [https://perma.cc/E2QY-SDUL] (analysing the factors influencing whether countries become tax havens and arguing that "governance quality has a statistically significant and quantitatively large association with the probability of being a tax haven"); *see also* Steven Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the "Liberia"* Problem, 70 EMORY L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3822421# [https://perma.cc/JJ9N-PLFU] (discussing issues of bias and

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lost somewhere.[69] Unfortunately, none of these speculative hints are enough to determine *where* or to *whom* taxes should ultimately be paid.

Ruth Mason, who argues that BEPS reflects and effectuate *full taxation*, does not hide its indeterminism, as well as the main reason for it: countries' diverse tax systems.[70] In Mason's words: "Because tax

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privilege in identifying tax havens); Michael Keen & Kai A. Konrad, *The Theory of International Tax Competition and Coordination* 50 (Max Planck Inst. for Tax L. & Pub. Fin., Working Paper No. 2012-06, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111895 [https://perma.cc/2UCZ-9VRF] (agreeing that the term "tax haven" is elusive but arguing that some characteristics appear to be repeated, such as zero or low tax rates on certain activities, the prevalence of non-real business activities, and secrecy).

69. Without going into Mason's specific intentions, one could still find some reasons to justify this apparent gap regarding the determination of tax rates. First, intuition: If companies tend to choose countries offering zero or very low tax rates to shift profits, it would be reasonable to expect that zero or too low tax rates—whatever that means—are excluded. That is, simple intuition could drive us to the conclusion that zero or too low tax rates are undesirable if all of a company's income should be taxed somewhere. However, what does make a zero-rate different from other rates, especially when zero is arithmetically arbitrary too? Intuition therefore—although helpful—would not be enough to shape all the boundaries of what a reasonable tax rate is, leaving us still in the uncertainty. Second, the idea that zero or too low tax rates would represent a presumption of the abusive shifting of profits—or even base erosion—which is similar to the role played by other presumptions in the design of some targeted anti-avoidance provisions. In the case of anti-hybrid rules, for example, double non-taxation—i.e., the outcome resulting from the disparities in the tax characterisation of the same financial instrument or the same entity between two countries—is the presumption that triggers the application of the rules, even in the absence of any traditional abusive element. That is, a denial of a deduction is applied in the payor state to the extent that the payment at stake is not considered as ordinary income in the recipient state, presuming that the result of a deduction/non-inclusion of income (or double non-taxation)—if the rule were not applied—is enough to consider that the whole transaction is vicious. If the denial of the deduction were not triggered, the presumption of abuse remains, triggering the automatic response of the other state. In other words, presuming that an untaxed hybrid transaction—or a zero-tax rate—is equivalent to abuse, the anti-hybrid rules operate by counteracting that presumption. Mason, *supra* note 1.

70. *Id.* at 385–88; Moyal, *supra* note 1, at 175 (recognising that single taxation and neutrality "shape the policy on *how* to divide taxation rights between countries, regardless of where the taxpayer is taxed").

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systems differ across jurisdictions, determining how much income a company has, and the rate at which that income should be taxed, requires a rule for deciding which state's rules for calculating income and tax rates will apply."[71] Therefore, unless countries agree on how to divide the income of a multinational group first, the conclusion that income has been too much or too low taxed is unsatisfactory.[72] In other words, without a clear distributive rule, countries will move around the inconsistencies of single taxation, taxing multiples times what has not been sufficiently taxed yet—i.e., endorsing full taxation—or not taxing at all under the assumption of avoiding double or multiple taxation.[73]

But this is not the only danger that the indeterminism of *full taxation* carries with it. Indeed, I identify two other important risks that are worth bearing in mind too.

First, countries might consider legitimate the approach of allocating revenues somewhere—no matter where—particularly if the ultimate aim is to close gaps or to avoid non-taxation altogether, even if nobody can explain yet why non-taxation really matters.[74] Such an approach is, in this author's view, risky because it turns the global trend into imposing taxation just for the sake of taxation, releasing countries from the unwritten duty to provide valid reasons for taxing.[75] This trend can already be seen in the case of anti-hybrid rules, whose unprincipled approach only aims at taxing somewhere, regardless of whether that *where* is the state originating the legal disparity that gave rise to the hybrid transaction or whether a major connecting factor provides nexus for the exercise of taxation.[76]

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71. Mason, *supra* note 1, at 385–86.

72. It is equally unsatisfactory, for instance, that the European Commission's state aid investigations decided in a completely unprincipled way that the profits shifted by U.S. multinationals out of EU member states must be recovered by EU member states. Such a result does not attend to *where* taxes should be paid but rather to the fact that taxes must be paid *somewhere*.

73. *Supra* Part II.B.

74. *See* discussion *supra* Part II.C.

75. If imposing taxation is justified by the simple fact of generating tax revenues, we should forget about any other "principle" of taxation, including, for example, taxation based on the ability-to-pay.

76. As Lüdicke states as regards hybrid entity mismatches: "It is primarily for the state which qualifies foreign entities differently from their home state to introduce anti-hybrid mismatch rules." Lüdicke, *supra* note 28,

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Second, it may generate more international tax chaos. Indeed, if we recognise that the new supreme principle behind provisions governing cross-border transactions will be a sort of "*we need to tax, no matter where or how*," it is evident that countries will find it easier to impose new types of taxes, some of them arguably legal, or even efficient. Let me take the example of unilateral digital services taxes around the world and particularly in Europe.[77] The whole debate

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at 317; *see also* PARADA, *supra* note 14, at 359 (considering the OECD anti-hybrid rules as incoherent because they apply without attending to whom generated the hybrid mismatch). For this reason, the author has also proposed what the author denominates a *"reactive coordination rule,"* which calls for the country generating the hybrid mismatch to react by accommodating its tax characterization of the entity to the one provided in the country where the relevant entity is organized. The proposal is based on the principles of simplicity, coherence, and ease of administration. *Id*. at 353–98.

77. The debate on digital services taxes (DSTs) was first established in Europe with a proposal for a directive, which did not have the political support to be finally approved. Such a failure pushed European countries into the race to implement unilaterally digital taxes resembling the failed European directive. *See Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, COM (2018) 148 final (Mar. 21, 2018) [hereinafter *EC DST Proposal*]. However, unilateral digital taxes have been rightfully criticised for being discriminatory, operating as tariffs, inviting retaliation, and even violating single taxation, that is, generating double taxation. *See* Ruth Mason & Leopoldo Parada, *Digital Battlefront in the Tax Wars*, 92 TAX NOTES INT'L 1183 (Dec. 17, 2018); *see also* Daniel Bunn, *A Summary of Criticisms of the EU Digital Tax*, TAX FOUND. (Oct. 22, 2018), https://taxfoundation.org/eu-digital-tax-criticisms/. More recently, see Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, 40 VA. TAX REV. 175 (2020). For the analysis of compatibility of DSTs and tax treaties, as well as their potential double taxation issues, see Daniela Hohenwarter et al., *Qualification of the Digital Service Tax Under Tax Treaties*, 47 INTERTAX 140 (2019); Roland Ismer & Christoph Jescheck, *Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model?*, 46 INTERTAX 573 (2018); Adolfo Martín Jiménez, *BEPS, the Digital(ized) Economy and the Taxation of Services and Royalties*, 46 INTERTAX 620 (2018); Adolfo Martín Jiménez, *Controversial Issues About the Concept of Tax in Income and Capital Tax Treaties in the Post-BEPS World*, *in* TAX TREATIES AFTER THE BEPS PROJECT: A TRIBUTE TO JACQUES SASSEVILLE 165 (Brian J. Arnold ed., 2018); Georg Kofler & Julia Sinnig, *Equalization*

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regarding the imposition of these new types of taxes is founded on the incapacity of our international tax rules to ensure that multinational tech companies—mostly owned by U.S. corporations—pay taxes in countries where they do not maintain a physical presence, because indeed the taxation of cross-border business profits is limited by the physical presence that an enterprise may have in a country, which is technically known as permanent establishment.[78] Therefore,

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Taxes and the EU's 'Digital Service Tax,' 47 INTERTAX 176 (2019). For a defense on unilateral DSTs, see, for example, Wei Cui, *The Digital Services Tax: A Conceptual Defense*, 73 TAX L. REV. 69, 72 (2019) (arguing that the DST "would allow location-specific rent (LSR) earned by digital platforms to be captured by the countries in which such rent arises"); *see also* Young Ran (Christine) Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate*, 72 ALA. L. REV. 131, 132 (2020) (arguing that the DST is a consumption tax and that "with certain modifications, can be a good solution for the tax challenges of the digital economy").

78. The OECD Model Tax Convention defines a permanent establishment as "a fixed place of business through which the business of an enterprise is wholly or partly carried on." OECD, Model Tax Convention, *supra* note 50, art. 5(1). For the debate regarding how our international tax rules do not fit our modern economy, see, for example, Yariv Brauner & Pasquale Pistone, *Adapting Current International Taxation to New Business Models: Two Proposals for the European Union*, 71 BULL. INT'L TAX'N, Dec. 2017, at 681; Georg Kofler et al., *Taxation of the Digital Economy: A Pragmatic Approach to Short-Term Measures*, 58 EUR. TAX'N, Apr. 2018, at 123 [hereinafter Kofler et al., *Pragmatic*]; Georg Kofler et al., *Taxation of the Digital Economy: "Quick Fixes" or Long-Term Solution?*, 57 EUR. TAX'N., Dec. 2017, at 523 [hereinafter Kofler et al., *Fixes*]; Wolfgang Schön, *Ten Questions About Why and How to Tax the Digitalized Economy*, 72 BULL. INT'L TAX'N, Apr./May 2018, at 278. Similarly, many have proposed meaningful options to address the issues raised by the digitalization of the economy, particularly the concern that market states may also tax. *See, e.g.*, *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, COM (2018) 147 final (Mar. 21, 2018) [hereinafter *EC Corporate Digital Proposal*] (proposing a significant, digital presence); Alan Auerbach et al., *Destination-Based Cash Flow Taxation* (Oxford Univ. Ctr. for Bus. Tax'n, Working Paper 17/01, 2017), https://eml.berkeley.edu/~auerbach/CBTWP1701.pdf [https://perma.cc/VD2K-J3WP] (detailing their proposal); Reuven S. Avi-Yonah et al., *Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split*, 9 FLA. TAX REV. 497 (2009) (proposing profit split apportionment); Andrés Báez Moreno &

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the absence of a permanent establishment in a source (market) country simply prevents this country from taxing.[79] Accordingly, although these business profits may nonetheless be taxed in the resident state where the parent companies are located, in most of the cases multinationals find a way to reduce the tax burden altogether. If countries follow the logic of *full taxation*, they will find an easy way to argue that the imposition of all these new digital taxes attends to the altruistic ideal that all income generated by a multinational tech company should be taxed *somewhere*, without attending to where that *somewhere* is. This may permanently close the door for any potential international agreement as regards an efficient global allocation of taxing rights, giving rise to a tax chaos in which the question on *where* to tax will simply be answered as *everywhere*.[80]

Yariv Brauner, *Tax Policy for the Digitalized Economy Under Benjamin Franklin's Rule for Decision-Making*, *in* Tax and the Digital Economy: Challenges and Proposals for Reform (Werner Haslehner et al. eds., 2019) (making the case for withholding taxes); Bret Wells & Cym Lowell, *Tax Base Erosion and Homeless Income: Collection at Source Is the Linchpin*, 65 Tax L. Rev. 535 (2012) (proposing base-erosion tax).

79. As per Article 7(1) of the OECD Model Tax Convention, the exclusive taxing rights correspond in this case to the residence state. That is, the source state is prevented to impose taxation if there is no permanent establishment in the source state. OECD, Model Tax Convention, *supra* note 50, at art. 7(1).

80. Currently, the international tax community is discussing the possibility of implementing an OECD Secretariat proposal—denominated "unified approach"—which creates a new non-physical nexus determined by the amount of sales that a business may have in a market jurisdiction, allowing therefore this jurisdiction to tax a proportion of those profits, even in the absence of a permanent establishment. For the details on the proposal for a unified approach, see OECD, *Public Consultation Document: Secretariat Proposal for a "Unified Approach" Under Pillar One* (2019), https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf [https://perma.cc/RW94-AQFR]. For some early analysis on this proposal, see Michael P. Devereux, *The OECD Pillar One Proposal*, Oxford Tax (October 22, 2019), https://oxfordtax.sbs.ox.ac.uk/article/oecd-pillar-one-proposal; *see also* Leopoldo Parada, *The Unified Approach Under Pillar 1: An Early Analysis*, 96 Tax Notes Int'l 983 (Dec. 16, 2019) (republished under the same title in *Taxploration* (2020)).

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However, some commentators are more optimistic.[81] In particular, Ruth Mason argues that, precisely because when divorced from a distributive rule *full taxation* as a norm may lead to double taxation, it may give states the incentive they need to achieve a common international consensus on the distributive rule. As she suggests: "[t]hrough incrementalism in the twentieth century and paroxysms in the twenty-first, countries have built consensus for a system in which all of company's income should be subject to tax once. Next, they will decide how to share that tax."[82]

I disagree with this optimistic view of BEPS and *full taxation*, which is indeed based on the arguable assumption that countries will automatically cooperate with each other on how to distribute global profits, independently of whether they have started collecting revenues or not. This assumption, however, disregards the true willingness of countries to renounce collecting tax revenues due to an international agreement, especially when those revenues are already part of their financial budget. Therefore, the premise that countries will simply renounce collecting digital taxes—once they have started—just because a global consensus is achieved is overoptimistic and, indeed, unrealistic. This does not mean, however, that a common international consensus is not preferable when compared to unilateral actions.[83] Moreover, it is evident that countries have no need to agree that all of a company's income must be taxed somewhere before discussing the specific distributive rules (*where* to tax) that they will apply.[84] This idea, which might attend to the economic intuition that "we first collect and then distribute," is nonetheless imprecise. Indeed, even though no one can avoid recognizing that there is a link between collection and distribution, no one can ensure the prevalence of the former over the latter. On the contrary, as proven by the notion of *full taxation*, a

81. Mason, *supra* note 1, at 388 (arguing that despite the criticism on BEPS, it actually "heated up discussions about *which state* should step in to fill tax voids").

82. *Id.* at 402.

83. Parada, *supra* note 80, at 989 (arguing that a common international solution "becomes a priority if we want to avoid a world in which all countries impose taxes that flout tax treaty obligations and result in permanent double taxation").

84. Mason does not argue this, but some enthusiastic use of the concept of *full taxation* could indeed support such a normative argument. Mason, *supra* note 1.

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discussion on taxing all of a company's income somewhere—that is, a discussion about generating revenues—becomes an empty box without having any notions regarding the specific distributive rule.[85]

Therefore, and from a pure normative perspective, inviting countries to commit to *full taxation* in order to later discuss how to allocate global tax revenues could be not only counterproductive but also dangerously risky, ultimately affecting the general stability of our always fragile international tax norms.

2. Overinclusiviness

As already stressed in this Article, single taxation is a notion that includes both the avoidance of double taxation and the avoidance of double non-taxation.[86] This latter concept—although conceptually unsettled in tax literature—generally refers to the complete absence of taxation, being therefore generally understood as exactly the opposite of double taxation.[87] *Full taxation*, however, goes beyond and embodies not only the prevention of double non-taxation in its basic understanding (the complete absence of taxation) but also the prevention of profit shifting, tax avoidance, tax evasion, tax loopholes, and even the still unclear notion of aggressive tax planning.[88] The foregoing makes the notion of *full taxation* certainly overinclusive.

The fact that a new legal notion attempts to include a range of other pre-existing, unclear—but sometimes related—concepts is not *a priori* counterproductive.[89] Indeed, it is the natural step to building a new theoretical framework. However, it carries with it some risks that may ultimately jeopardise the good intentions behind it. First, it risks mixing up legal terms without contributing to their conceptual clarity. Particularly, the fact that *full taxation* includes not only the prevention

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85. *Id.* at 378 n.173 (arguing that "the concept of full-taxation is incomplete without a distributive rule to supply the tax base or bases and rate or rates").

86. *Supra* Part II.

87. *See supra* 39–41 and accompanying text.

88. Mason, *supra* note 1, at 370.

89. This is also why the criticism on the concept of full taxation as being overinclusive should be understood in its strict context. That is, nothing prevents that overinclusiveness can be seen as a positive characteristic in a completely different context, such as the case of general anti-avoidance rules.

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of double non-taxation but also the avoidance of profit shifting, tax avoidance, tax evasion, tax loopholes, or aggressive tax planning negatively impacts the proper understanding of double non-taxation, affecting as well the delineation of the traditional boundaries between legitimate and illegitimate tax avoidance, increasing the level of legal uncertainty for taxpayers, and raising further issues of interpretation.[90]

Let me illustrate the above with an example. Some years ago, states agreed to change the title and preamble of the OECD Model Tax Convention in order to reflect not only the avoidance of double taxation but also the prevention of "tax evasion and tax avoidance."[91] Ultimately, this would underline the idea that tax treaties now pursue also the object and purpose[92] of preventing double non-taxation, which would be embodied in the concept of *full taxation*.[93] This assumption is, however, arguable.

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90. *See* PARADA, *supra* note 14, at 34–46 (arguing that the concept of double non-taxation cannot be homologated with either tax evasion or tax avoidance, and that such a homologation only contributes to confuse legal terms).

91. The OECD BEPS Action Plan 6 replaced the current title of the OECD Model Tax Convention as follows: "Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance." OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6: 2015 Final Report* 91 (2015), https://doi.org/10.1787/9789264241695-en [https://perma.cc/M3RW-BJGD]; *see also* OECD, *Draft Contents of the 2017 Update to the OECD Model Tax Convention* 10 (2017), http://www.oecd.org/tax/treaties/draft-contents-2017-update-oecd-model-tax-convention.pdf [https://perma.cc/ED8Q-NQVM]; OECD, *Draft Contents of the 2017 Update to the OECD Model Tax Convention, Comments Received on the 11 July 2017 Public Release* (2017), https://www.oecd.org/ctp/treaties/public-comments-on-draft-contents-2017-update-OECD-model.pdf [https://perma.cc/Y2ZL-LPRA] [hereinafter OECD, *Comments Received*].

92. "Object and purpose" is an integral expression that does not refer to the intention of the contracting states in a tax treaty but rather to the objective aim of the treaty reflected by the treaty as a whole. *Introduction* to 1 KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS 39 m.no. 85 (Ekkehart Reimer & Alexander Rust eds., 4th ed. 2015) [hereinafter VOGEL DTCS].

93. Mason, *supra* note 1, at 371–72 (arguing that BEPS pursues full taxation by requiring states to increase their efforts to prevent the abuse of tax treaties, using as example the change in the preamble of tax treaties, which now includes a reference to "tax evasion and avoidance"). If Mason's

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Indeed, the reference to tax evasion or tax avoidance in the title of tax treaties is not equivalent to saying that tax treaties must now prevent any form of double non-taxation, let alone achieve *full taxation*.[94] In contrast, that modification only confirms that double non-taxation is not, and was never, a tax treaty concern, although it may become one when tax treaties are subject to abuse in order to artificially achieve a non-taxation outcome[95]—that is, when double non-taxation is indeed the result of tax evasion or tax avoidance. The foregoing simply confirms that the tax treaty entitlement is conditioned upon substance and economic functionality, that is, activities that contribute to value creation or an active trade or business.[96] Therefore, taxpayers should not be considered to have abused a treaty where genuine businesses are set up, even if non-taxation derived from the application of that treaty is the result of those businesses. In other words, double non-taxation can be a perfectly acceptable outcome provided that non-artificial arrangements are observed.[97]

In line with this idea, the modification of the preamble of the OECD Model Tax Convention reaffirms the understanding that double non-taxation is an undesirable tax treaty outcome only to the extent this is the result of illegal or fraudulent conduct from the taxpayer. As stated in the preamble, tax treaties are not intended to "creat[e] opportunities for non-taxation or reduced taxation *through* tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of

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interpretation is correct, there is no doubt that the preamble of tax treaties is part of their "context" and, therefore, of their overall interpretation. VOGEL DTCS, *supra* note 92, at 39 m.no. 82.

94. The modification introduced in the title of tax treaties is not a novelty from BEPS. Indeed, it exists from 2003 when paragraph 7 of the OECD Commentaries on Article 1 was modified in order to include the alluded reference to tax evasion and tax avoidance. Paragraph 7 reads now as follows: "It is also a purpose of tax conventions *to prevent tax avoidance and evasion*" (emphasis added). OECD, *Commentaries on the Articles of the Model Tax Convention* 59 (2010), http://www.oecd.org/berlin/publikationen/43324465.pdf [https://perma.cc/92R8-GWW5]. There is no evidence in the tax treaty case law around the world confirming that this phrase has been interpreted strictly as to prevent double non-taxation.

95. PARADA, *supra* note 14, at 95–98.

96. *Id*. at 98.

97. *Id*.

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residents of third States).”[98] That is to say, in all of those cases in which double non-taxation has been generated via neither fraudulent conduct of the taxpayer nor objectionable, but not illegal, conduct aimed at reducing the taxpayer’s tax burden, the outcome of double non-taxation should not be regarded as a cause of concern at all.[99] Any other interpretation would certainly exceed the OECD BEPS mandate.[100]

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98. OECD, Model Tax Convention, *supra* note 50, pmbl. (emphasis added). The modification of the preamble is accompanied by an inclusion of a paragraph 16.1 in the Introduction, which says: “The changes made expressly recognize that the purposes of the Convention are not limited to the elimination of double taxation and that the Contracting States do not intend the provisions of the Convention to create opportunities for non-taxation or reduced taxation through tax evasion and avoidance.” *Id.* intro. ¶ 16.1. Similar wording was also introduced in the revised preamble of the 2016 U.S. Model, which states:

> The Government of the United States of America and the Government of_________, intending to conclude a Convention for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed to obtain reliefs provided in this Convention for the indirect benefit of residents of third states), have agreed as follows:

United States Model Income Tax Convention, pmbl. (2016), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Treaty-US%20Model-2016.pdf [https://perma.cc/YR69-FAJH] [hereinafter U.S. Model].

99. Parada, *supra* note 14, at 97. In contrast, see, for example, Leandra Lederman, *W(h)ither Economic Substance*, 95 Iowa L. Rev 389 (2010) (where she criticises the U.S. economic substance doctrine and shows how it can be exploited to allow abusive transactions to stand simply because they are bundled with business activity); Leandra Lederman, *A Tisket, A Tasket: Basketing and Corporate Tax Shelters*, 88 Wash. U. L. Rev. 557 (2011) (where she proposes a U.S. basketing system for corporate tax purposes in order to avoid the abuse of laws).

100. OECD, *Action Plan*, *supra* note 13, at 10 (“[n]o or low taxation is not per se a cause of concern, but it becomes so when it is associated with

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Second, as *full taxation* includes a series of terms that generally use double non-taxation as a proxy for abusive practices, it raises concerns regarding those who may *a priori* conclude that "*non-full taxation*," including double non-taxation, might be equivalent to abuse.[101] This is something similar to what can be seen with the elusive concept of "aggressive tax planning."[102] The OECD BEPS used this notion with the purpose to identify tax-planning structures that comply with the wording of the law but not with its spirit, aiming to explain the loopholes and inconsistencies in cross-border transactions that involve the

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practices that artificially segregate taxable income from the activities that generate it").

101. It is evident that there is not a general and horizontal concept of abuse of law, and different elements may be considered for the analysis. For example, in EU law the concept of abuse is clearly influenced by the element of artificiality, as the doctrine of the Court of Justice of the European Union (CJEU) has stated in *Cadbury Schweppes,* which makes it rather restrictive. Case C-196/04, Cadbury Schweppes plc v. Comm'rs Inland Rev., ECLI:EU:C:2006:544 (Sept. 12, 2006). For literature on abuse of law, see various commentators in PROHIBITION OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF LAW? (Rita de la Feria & Stefan Vogenauer eds., 2011); *see also* Rita de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principle of EC Law Through Tax*, 45 COM. MKT. L. REV. 395 (2008).

102. The expression of "aggressive tax planning" originated in the United States where it was used for structures designed against the spirit or purpose of the regulations. José Manuel Calderón Carrero & Alberto Quintas Seara, *The Concept of 'Aggressive Tax Planning' Launched by the OECD and the EU Commission in the BEPS Era: Redefining the Border Between Legitimate and Illegitimate Tax Planning*, 44 INTERTAX 206 (2016). For more literature on the notion of "aggressive tax planning," see, for example, Ana Paula Dourado, *Aggressive Tax Planning in EU Law and in the Light of BEPS: The EC Recommendation on Aggressive Tax Planning and BEPS Actions 2 and 6*, 43 INTERTAX 42 (2015); Clemens Fuest et al., *Profit Shifting and "Aggressive" Tax Planning by Multinational Firms: Issues and Options for Reform*, 5 WORLD TAX J., no. 3, 2013; F. Alfredo García Prats, *Los Límites a la Planificación Fiscal Agresiva y al Abuso de las Normas Tributarias,* in X CONGRESO TRIBUTARIO: LA JUSTICIA: ¿GARANTÍA DEL ESTADO DE DERECHO? 289 (Manuel José Baeza Díaz-Portales ed., 2015); Paolo Piantavigna, *Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies*, 9 WORLD TAX J., Feb. 2017, at 47.

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application of different domestic tax systems.[103] The European Union adopted the term and understood it as "taking advantage of the technicalities of a tax system or of the mismatches between two or more tax systems for the purpose of reducing tax liability."[104] Therefore, it is evident that any transaction the purpose of which is to achieve double non-taxation—with or without economic substance involved—may ultimately be considered as "aggressive tax planning."[105] Now, since *full taxation* also comprehends the aim of preventing aggressive tax planning, it is not surprising that some may conclude *a priori* that transactions that do not achieve *full taxation* can be regarded as "aggressive," whatever aggressive ultimately means.

Although this Article does not attempt to provide an exhaustive theory of anti-avoidance, one should be able to foresee the problems in an overinclusive concept such as *full taxation*, particularly as regards the proliferation of new anti-avoidance provisions.[106] Indeed, if *full taxation* becomes an *irrebuttable presumption*,[107] it may be used to

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103. OECD, *Mandatory Disclosure Rules, Action 12: 2015 Final Report* (2015), https://doi.org/10.1787/9789264241442-en [https://perma.cc/NX2J-FUCT]. However, the OECD already used it in the past. *See* OECD, *Corporate Loss Utilization Through Aggressive Tax Planning* (2011), https://doi.org/10.1787/9789264119222-en [https://perma.cc/T22M-L2U9]; *see also* Calderón Carrero & Quintas Seara, *supra* note 102, at 210.

104. *Commission Recommendation of 12.6.2012 on Aggressive Tax Planning*, at 2, C(2012) 8806 final (Dec. 6, 2012).

105. Parada, *supra* note 14, at 48 (arguing that this "consequentialist approach" carries with it the risk of understanding tax avoidance, generally linked to economic substance, as the simple avoidance of non-taxation altogether).

106. The proliferation of anti-avoidance measures is also stressed in the recent OECD Global Anti-Base Erosion and Profit Shifting proposal ("GloBE rule"), arguing that GloBE rules may serve the policy aim of controlling the proliferation of anti-abuse measures. OECD, *GloBE*, *supra* note 66, at 28. This assertion is nonetheless arguable because it considers the proposed rules as a "super anti-abuse provision," even though no element of abuse is present in the design of those provisions. See more of this in Leopoldo Parada, *The Tax Policy Rationale of GloBE* (forthcoming; on file with author); *see also* Devereux et al., *supra* note 67, at 9.

107. An irrebuttable presumption is one "when the proof of one fact is deemed to establish the existence of another fact." Emily Cauble, *Presumptions of Tax Motivation*, 105 Iowa L. Rev. 1995, 2015 (2020). That is, it cannot be contested. However, irrebuttable presumptions are not properly

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justify almost any new specific or targeted anti-avoidance provision that a government wishes to introduce.[108]

It is important to bear in mind that the general use of presumptions in the design of anti-avoidance provisions does not represent by itself a problem, but only when those presumptions become irrebuttable.[109] For example, interest limitation rules presume that the deduction of interest in excess of a certain threshold is enough to consider the deduction itself as abusive, restricting the deductibility accordingly.[110] This will not be an issue to the extent the taxpayer can argue otherwise, rebutting such a presumption.[111] The issue is, however, that most of the post-BEPS anti-abuse provisions only (or mostly) contain irrebuttable

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"presumptions" in a strict sense (a presumption can generally be overcome) but rather "per se rule[s] of substantive law." *Id.*

108. Dourado, *supra* note 102, at 45 (arguing also that domestic anti-abuse provisions cannot rely on "irrebuttable presumptions" but imply a case-by-case assessment).

109. In addition, irrebuttable presumptions in tax law have been generally held disproportionate by the Court of Justice of the European Union. *See* Johanna Hey, *Base Erosion and Profit Shifting and Interest Expenditure*, 68 BULL. INT'L TAX'N, no. 6/7, 2014, at 340; *see also* Ana Paula Dourado & Rita de la Feria, *Thin Capitalization and Outbound Investment: Thin Capitalization Rules in the Context of the CCCTB*, *in* COMMON CONSOLIDATED CORPORATE TAX BASE 785 (Michael Lang et al. eds., 2008). For the CJEU's decisions, see, for example, Case C-298/05, Columbus Container Servs. BVBA & Co. v. Finanzamt Bielefeld-Innenstadt, ECLI:EU:C:2007:754 (Dec. 6, 2007); Case C-524/04, Test Claimants in the Thin Cap Grp. Litig. v. Comm'rs of Inland Revenue, ECLI:EU:C:2007:161, ¶¶ 81–82 (Mar. 13, 2007); Case C-196/04, Cadbury Schweppes plc v. Comm'rs Inland Rev., ECLI:EU:C:2006:544, ¶ 65 (Sept. 12, 2006).

110. Dourado, however, considers that rules limiting interest deductions do not operate on the basis of rebuttable or irrebuttable presumptions but rather at a previous level avoiding "mismatches." That is, they are not properly anti-abuse provisions. Dourado, *supra* note 102, at 49; *see also* Aitor Navarro et al., *The Proposal for an EU Anti-Avoidance Directive: Some Preliminary Thoughts*, 25 EC TAX REV. 117 (2016) (criticising also the interest limitation provision in the EU anti-tax avoidance directive for not being a proper anti-abuse measure).

111. For instance, a company might have the chance to prove that the transaction is arm's length, avoiding the limitation in the deductibility of interest payments, that is, rebutting again the presumption regarding the excess of indebtedness as equivalent to abuse.

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presumptions. A good example is the anti-hybrid rules. These provisions assume that any disparity in the characterisation of entities or instruments that result in double non-taxation should be subject to the scope of the provisions, building upon the presumption that double non-taxation is equivalent to abuse, even though no true element of abuse might slightly be distinguishable in those transactions.[112] There is no possibility to rebut that presumption of abuse. In this regard, therefore, countries may find in the overinclusive concept of *full taxation* the perfect excuse to justify new anti-avoidance provisions simply based on the ideal that all of a company's income has to be taxed somewhere, a presumption almost impossible to rebut.

In sum, therefore, the notion of *full taxation* does not only stigmatise the outcome of double non-taxation in a permanent way but also fails to respond to the core question as regards its conceptual nature, disguising it as a new overinclusive legal category. Perhaps, it is time to stop creating innovative legal categories to justify unprincipled ideas behind projects like BEPS and to recognize that the boundaries of the notion of double non-taxation—understood either in isolation or as part of *full taxation*—are those of a simple outcome, which, absent subjective interpretations, should not be regarded *per se* as a cause of concern.[113]

3. Instrumentalism

Besides the indeterminism and overinclusiveness, the notion of *full taxation* proves also to be very instrumentalist,[114] serving the sole purpose of justifying provisions that operate under the premise that, if one country does not impose taxation, another country automatically pulls the trigger and does so without any principled guidance that truly

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112. Parada, *supra* note 19 (referring to this characteristic of the rules as "consequentialist").

113. PARADA, *supra* note 14, at 51 (concluding that the boundaries of the notion of double non-taxation "should remain within its nature of a simple outcome").

114. Hans Gribnau, *Legislative Instrumentalism vs. Legal Principles in Tax Law*, INT'L TAX L. REV., no. 3, 2012, at 9, 18 ("Instrumentalism is the view of law as merely a technique or a means to implement policy goals. To the instrumentalist, law is no more than just a particular technique. It is a product of policy that is used in order to implement policy, in particular to achieve economic and social ends such as economic growth and employment.").

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supports this pragmatic approach, other than the idea that all of a company's income should be taxed once.[115]

A good example of these types of provisions are the already explained OECD anti-hybrid rules, which coordinate the tax outcomes of two jurisdictions, denying a deduction in the payor state if there is no corresponding inclusion of income in the payee state or imposing taxation in the recipient state if the former rule did not apply.[116] Similarly, the recent Global Anti-Base Erosion Proposal or GloBE [117] calls for the development of coordinated rules among countries in order to avoid the shifting of profits by multinationals with the result of no or low taxation. GloBE includes for this purpose two specific domestic rules that resemble the BEPS anti-hybrid rules:[118] an "*income inclusion rule*," which would allow countries to tax income from branches or controlled entities abroad to the extent that income has not been subject to a minimum effective taxation, and an "*undertaxed payment rule*," which would deny a deduction or grant source-based taxation (including withholding taxes) for payments made to related parties to the extent that those payments were again not subject to minimum taxation.[119] In both cases—i.e., anti-hybrids and GloBE rules—the reasoning and the mechanic are the same: they are coordinated provisions that are automatically triggered to ensure single taxation (or *full taxation*).[120]

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115. Mason, *supra* note 1, at 376–80 (referring to these types of provisions as "fiscal fail-safes").

116. OECD, *Action 2 Final Report*, *supra* note 14; *see also supra* Part II.B (explaining these rules).

117. OECD, *GloBE*, *supra* note 66; *see also supra* note 66 (for additional references to literature).

118. These provisions should be complemented by two tax treaty provision: a tax treaty *switch-over rule*, which would allow a country to switch from exemption to credit method when profits are attributed to a permanent establishment (PE) or they are derived from immovable property (not part of a PE) and are not subject to minimum effective taxation, and a *subject to tax rule,* which would grant or deny tax treaty benefits if an item of income was not subject to tax at a minimum rate. OECD, *GloBE*, *supra* note 66, at 6.

119. *Id*.

120. Mason, *supra* note 1, at 376 (arguing that "[f]iscal fail-safes not only share a mechanism—linking triggers—but they also share a goal, namely, full taxation").

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In other words, these rules are the result of the "BEPS policy"—single taxation—serving the purpose of achieving that self-created policy.[121]

Although legal instrumentalism is not the main subject of this Article, it is perhaps important to recall here that tax law is not only about "problem-solving provisions" pursuing arbitrary policies, even if those provisions are the result of innovative pragmatism.[122] In contrast, tax law—like law in general—is comprised of values and principles that may serve the purpose of shaping the law itself, protecting taxpayers against arbitrariness or discrimination.[123] This is particularly important when the policy pursued is not the correct one.

Let me take the example of the *primary response* (anti-hybrid rule) and its interaction with interest limitation rules to exemplify the above. If we recall, a *primary response* has the purpose of automatically denying a deductible payment in the payor state if that payment has not been recognised as ordinary income in the payee state. An *interest limitation rule* (another type of specific anti-avoidance rule)[124] works similarly, limiting however the general deductibility of interest expenses in cross-border financial structures in order to maintain the debt/equity

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121. *Id*.

122. Mason, for example, considers the new anti-hybrid provisions as a "kind of innovative, pragmatic problem-solving typified BEPS." *Id*. at 377.

123. Gribnau, *supra* note 114, at 16–17 (arguing that legislative instrumentalism is a pervasive phenomenon and that law is more than an instrument to achieve social and economic ends).

124. In brief:

> [P]rovisions limiting the deductibility of interest expenses consist in either a fixed debt-equity ratio, also known as *thin capitalization rules*, or a limitation in the excess of interest expenses calculated as a percentage of the taxable EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), also known as *earnings stripping rules*. The majority of the countries opt for this latter option, providing for a limitation in the deductibility of net interest expenses up to 30% of the amount of taxable EBITDA to the extent that the net interest expenses do not exceed certain thresholds, in some cases, and, in other cases, only if the entity in excess of indebtedness is part of a group.

Parada, *supra* note 25, at 211.

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ratio in a company.[125] At first sight, therefore, the interaction between the two provisions appears to be nothing more than a classic relationship between *lex specialis* and *lex generalis*.[126] However, there is a fundamental difference, and it is that whilst the *primary response* does not contemplate the possibility of using the denied interest deductions in future years—affecting the *ability-to-pay* principle—the interest limitations rules generally do. Therefore, if one follows a comprehensive understanding of the international tax law—compounded by principles and not only by automatic tax triggers—the priority should be given to interest limitation rules over anti-hybrid rules, at least if one does not want to affect the ability to pay.[127] Interestingly, however, the OECD recommendations in BEPS go in exactly the opposite direction, arguing for the application of anti-hybrid rules first "as matter of logic."[128]

Lastly, the instrumentalism promoted by the concept of *full taxation* may also prevent countries from developing consistent tax provisions, opting for pragmatic views, even when such pragmatism may ultimately imply more complexity and less coherence from a tax policy perspective. Let me illustrate this using again the example of hybrids.

As noted in this Article already, the OECD BEPS opted to target hybrids, paying attention to the outcomes rather than the underlying disparities that originated the hybrid concern in its core, proposing rules

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125. *See, e.g.*, Schön et al., *supra* note 15.

126. Economically speaking, too, both rules achieve a similar economic effect; that is, they increase the taxable base of the taxpayer in the same amount of non-allowable deductions in the payer state. Parada, *supra* note 25, at 210.

127. *Id.* at 226–29.

128. OECD, *Action 2 Final Report*, *supra* note 14, at 97. As stated by the OECD:

> Rules to address hybrid mismatch arrangements should be applied by an entity before the fixed ratio rule and group ratio rule to determine an entity's total net interest expense. Once this total net interest expense figure has been determined, the fixed ratio rule and group ratio rule should be applied to establish whether the full amount may be deducted, or to what extent net interest expenses should be disallowed.

Id. at 103.

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linking the tax outcomes in one jurisdiction with those of the other jurisdiction.[129] Those provisions were well-received in Europe, where they were introduced as secondary European Union law.[130] However, the European response came as a surprise, especially because a different European proposal had been on the table first. Indeed, the original proposal called to coordinate the tax characterisation of entities and financial instruments establishing a simple rule that stated that member states should follow the tax characterisation of the entity or instrument in the source state.[131] Such a rule did not only make more sense in a European coordinated context, but also, and more importantly, it distinguished and targeted the true issue behind hybrids, that is, the disparate tax characterisation between two jurisdictions.[132] In other words, instead

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129. The OECD proposed a *primary response*, which denied a deduction if that deduction was not correspondingly included as income in the payee state, and a *defensive rule*, which imposed taxation on the hybrid payment in case a deduction on that payment was granted in the payer state. OECD, *Action 2 Final Report*, *supra* note 14, at 17, 49; *see also supra* Part II.B.

130. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, 2016 O.J. (L 193) 1 [hereinafter ATAD 1], as amended by Council Directive (EU) 2017/952 of 29 May 2017 Amending Directive (EU) 2016/1164 as Regards Hybrid Mismatches with Third Countries, 2017 O.J. (L 144) 1 (known as ATAD 2).

131. The first proposal for the ATAD provided indeed a coordination rule, which read as follows:

> Where two Member States give a different legal characterisation to the same payment (hybrid instrument) and this leads to a situation where there is a deduction in the Member State in which the payment has its source without a corresponding inclusion of the same payment in the other Member State, the legal characterisation given to the hybrid instrument by the Member State in which the payment has its source shall be followed by the other Member State.

Proposal for a Council Directive Laying Down Rules Against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, at art. 10, COM (2016) 26 final (Jan. 28, 2016).

132. This author has also proposed a coordinated approach as regards mismatches involving hybrid and reverse hybrid entities. For these

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of paying attention to the prevention of the double non-taxation outcome, it opted to look at the disparities that originated the problem in its core. Yet, perhaps the convincing idea that all of a company's income should be taxed once—and somewhere—was politically more palatable.[133] That is nonetheless surprising—even from a strict single-tax perspective—because if a rule such as the one originally proposed in Europe would have been finally adopted, single taxation could have not only been properly ensured, but with a lower level of complexity and more coherence too.[134]

Similarly, it may be the case that a pure instrumentalist approach does not allow us to realise some important conceptual incoherencies in the design of international tax rules. This is evident if we take the example of *full taxation* and the global proposal to ensure a minimum corporate income taxation, i.e., GloBE rules, which operate as linking rules.[135] Indeed, if the notion of *full taxation* comprises the idea of taxing all of a company's income in places where it has real business activities, it is rather arguable that the GloBE rules may ensure that goal. Let us assume the example of a corporation *A*, tax resident in state *A*. This entity has two subsidiaries: *B* and *C*, which are tax residents in state *B* and *C*, respectively. Let us also assume that each subsidiary owns a sub-subsidiary—*D1* and *D2*—in state *D*, a low or zero corporate tax country. Finally assume that *B* and *C* make royalty payments to *D1* and *D2* for the use of intangibles.

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proposals, see Leopoldo Parada, *Hybrid Entity Mismatches: Exploring Three Alternatives for Coordination*, 47 INTERTAX 24 (2019) (arguing for coordination in the tax characterisation of entities as an alternative to replace the current OECD linking rules). In this regard, also see PARADA, *supra* note 14, 353–98 (arguing for a "domestic reactive coordination rule" as an alternative to deal with hybrid entity mismatches at the international level).

133. Parada, *supra* note 17, at 228.

134. Parada, *supra* note 132, at 26 (analysing three alternatives to the OECD linking rules and arguing that all of them—although not being the core of the proposals—effectively ensure single taxation).

135. For the GloBE rules, see OECD, *GloBE*, *supra* note 66, and OECD, *Tax Challenges*, *supra* note 66; *see also supra* note 66 (for literature references).

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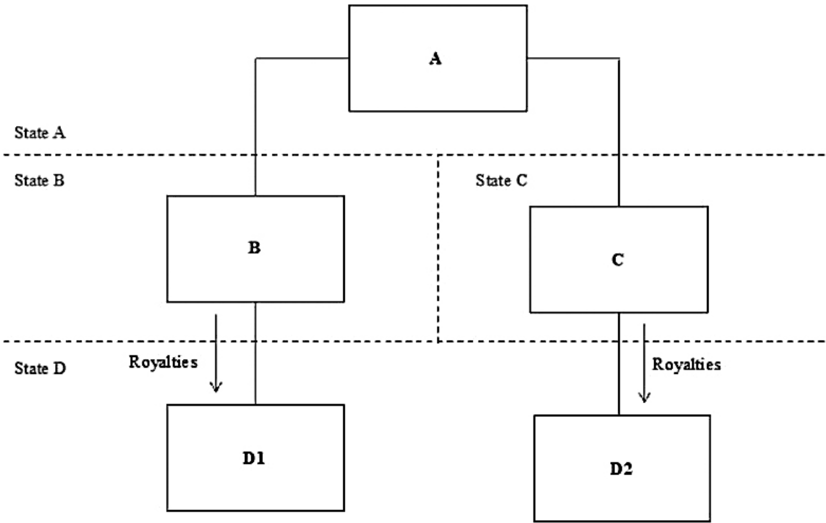
Figure 1: Example (source: Oxford report on GloBE)[136]



The GloBE rules appear to grant rights to tax to states *A*, *B*, and/or *C*.[137] However, such rights are not granted under the assumption that factors of production are necessarily located in states *A*, *B*, or *C* but rather under the simple assumption that income must be taxed (or be sufficiently taxed) somewhere.[138] Indeed, if one assumes, for instance, that the intangible in the foregoing example has been developed in a state different than *A*, *B*, or *C*, there is no principled guidance why those countries should be entitled to tax the profits derived from the use of such an intangible,[139] unless, of course, one recognises that *full*

136. This example is inspired by the example in Devereux et al., supra note 67, at 3.

137. This will depend on whether the income inclusion rule applies at the level of the ultimate parent company or not.

138. Devereux et al., *supra* note 67, at 4 (arguing that the justification for states *A*, *B*, or *C*—in the example above—to tax would not be based on the claim that value is created there).

139. At least if one adheres to the also arguable idea of "value creation," which was introduced by the OECD BEPS Project (OECD, *Action Plan*, *supra* note 13, at 20), but which is not exempt from criticism due to its unclear meaning. For some of the criticism on the concept of value creation, see, for example, Itai Grinberg, *International Taxation in an Era of Digital*

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taxation is not about taxing where factors of production are located but rather about taxing somewhere.[140] Similarly, if one assumes that all shareholders of company *A* are not located there but in state *X* (i.e., capital is somewhere else)—that is, if company *A* does not carry on businesses in that market (state *A*) but somewhere else—the reason to assign state *A* primary taxing rights based on where factors of productions are located is certainly unjustified. Therefore, whilst there are no doubts that the rules ensure taxation once, they do not necessarily ensure that taxation occurs where the factors of production are located, contradicting the notion of *full taxation* itself, or perhaps, demonstrating the limitations of the concept of *full taxation*.

IV. Full Taxation and International Law

This last Part argues against the idea that *full taxation* may represent a new international tax norm, at least from a strict international law perspective.[141] The arguments against this are twofold. First, no

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Disruption: Analyzing the Current Debate, Taxes, Mar. 2019, at 73, 95 (defending the view that value creation is an ambiguous term); Johanna Hey, *"Taxation Where Value Is Created" and the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72 Bull. Int'l Tax'n, Apr./May 2018, at 203 (arguing that value creation is an imprecise principle); Adolfo J. Martín Jiménez, *Value Creation: A Guiding Light for the Interpretation of Tax Treaties?*, 74 Bull. Int'l Tax'n, Apr./May 2020, at 197 (arguing that the concept of value creation may not be compatible with tax treaties); Susan C. Morse, *Value Creation: A Standard in Search of a Process*, 72 Bull. Int'l Tax'n, Apr./May 2018, at 196, 198 (pointing out that the concept of value creation is "open-ended enough that it could bend towards destination sales, capital residence or global justice approaches"); Wolfgang Schön, *One Answer to Why and How to Tax the Digitalized Economy* 5 (Max Planck Inst. for Tax L. & Pub. Fin., Working Paper No. 2019-10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3409783 [https://perma.cc/5NGE-V4U2] (arguing that value creation is just the old benefit principle).

140. Mason recognises that full taxation is indeterminate as to whether income should be shifted back to source, up to the residence state, or to some third state that presently lacks a tax entitlement. However, she appears to put all these conceptual and normative drawbacks below an apparent higher degree of concern, which is closing gaps and raising revenues in a global coordinated way. Mason, *supra* note 1, at 385.

141. Although the argument that full taxation represents a new international norm in strict sense has not been presented as such yet, the

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international law provision prohibits double (or multiple) taxation, let alone taxation lower than *full.* Second*, full taxation* does not meet the requirements to be considered international custom.[142] However, considering the dynamic development of international custom, it is perhaps too early to venture a definitive answer in this regard.

A. Taxing More and Lower Than Once

There is no international norm that prohibits either double taxation or double non-taxation.[143] Such an absence simply recognizes that both outcomes—double taxation and double non-taxation—are indeed perfectly accepted under international law, unless an express prohibition says otherwise.[144] This is a well-settled doctrine in international law, and it is perfectly applicable to taxation.[145]

If one considers the unilateral motivations for countries to implement a tax credit, exemption, or whatever other method used to relieve double taxation, they respond strictly to specific, and most of the time agnostic, domestic tax policies.[146] In some cases, the relief of

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indirect suggestions from Mason when she says that "BEPS both confirmed and operationalized full taxation as a new international tax norm," makes the development of the argument relevant. *Id.* at 370 (referring to full taxation as a new international tax norm).

142. The first reference to international tax customary law was made by Reuven Avi-Yonah, who in the past proposed the recognition of a coherent international tax regime embodied both in the tax treaty network and in domestic tax laws of the major trading nations, and which would form part of customary international law. *See* Avi-Yonah, *supra* note 6 (1997 article). He elaborated further on this argument later in time. Avi-Yonah, *supra* note 8 (2007 book).

143. Double non-taxation, and particularly its prevention, is embodied in Mason's concept of *full taxation*. Mason, *supra* note 1.

144. Vogel DTCs, *supra* note 92, at 14 m.no. 11 (arguing that "[d]ouble taxation, resulting from the interaction of the domestic laws of two (or more) States, will be consistent with international law as long as each individual legislation is consistent with international law").

145. *See, e.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7); Georg W. Kofler & Ruth Mason, *Double Taxation: A European "Switch in Time?"*, 14 Colum. J. Eur. L. 63 (2007).

146. For example, in the United States, the foreign tax credit was enacted in 1918 because it was very difficult for U.S. companies to compete

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double taxation seems not to be a problem at all as it happens with many developing countries or transition economies where residents of these countries are expected to receive less income from foreign sources, with the relief of double taxation not being a priority.[147] Likewise, a country is not obliged to apply either the credit or exemption method to relieve double taxation; it could simply switch from those methods to granting a simple deduction of the foreign taxes paid.[148] After all, and economically speaking, foreign taxes are nothing else than a cost.[149]

The story is not that different as regards tax treaties. Although it is undeniable that tax treaties help prevent double taxation in a comprehensive manner,[150] providing a common tax language through the use of the OECD Model Tax Convention or the United Nations Model Tax Convention,[151] that does not mean either that an international obligation to relieve double taxation is imposed on states in the absence of

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with foreign companies when they were given only a deduction, as happened before the enactment of the foreign tax credit. Moreover, foreign companies were exempted from taxation on foreign source income or were granted a tax credit for foreign income taxes paid. In light of tax neutrality arguments, the United States ultimately opted for a tax credit. *See* Herman B. Bouma, *What Is the Purpose of the Foreign Tax Credit?—A True/False Quiz: Can You Ace it?!*, 40 Tax Mgmt. Int'l J. (BNA), no. 1, 2011, at 43; *see also* Boris I. Bittker & Lawrence Lokken, Fundamentals of International Taxation: U.S. Taxation of Foreign Income and Foreign Taxpayers 72-3ff (2011–12 ed.).

147. Vann, *supra* note 38.

148. In the United States, for example, the taxpayer can elect to apply the tax credit or to deduct the taxes under I.R.C. § 164(a).

149. Shaviro, *supra* note 36, at 16 (arguing that "[f]rom the domestic standpoint, foreign taxes are just a cost like any other, since home country individuals do not get to spend the revenues").

150. Bouma, *supra* note 146.

151. Even specific Treaty Models used by some countries as a starting point in the negotiations are quite similar to the OECD and UN Model. That is the example of the U.S. Model, *supra* note 98, as well as of the Belgian and Swedish Tax Treaty Models. 2010 Belgian Draft Model Income and Capital Tax Convention and Final Protocol, June 1, 2010, Tax Analysts Doc 2016-4164; 1998 Swedish Model Income and Capital Tax Convention, Sept. 1, 1998, Tax Analysts Doc 98-37938.

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an international agreement[152] or that tax treaties mainly pursue the avoidance of double taxation.[153]

Just as in the case of double taxation, there is no international norm that obligates countries to prevent double non-taxation either.[154] As argued in this Article already, double non-taxation—at least from a strict domestic perspective—should be understood as another way to exercise the tax sovereignty.[155] That is, just as taxation is *per se* an expression of sovereignty, the absence of taxation is a completely legitimate economic policy that a state may choose to pursue or not. Similarly, and from a tax treaty perspective, states are neither bound to prevent the non-taxation outcome nor to pursue it.[156] The above, however, does not prevent countries from including under certain circumstances tax treaty provisions either to prevent or to pursue the non-taxation outcome.[157] In both cases, however, the double non-taxation outcome remains just that—an outcome—and it does not influence the manner in which tax treaties should be interpreted.[158] In simple words, the prevention of double non-taxation is limited to those cases in which

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152. Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 Wash. L. Rev. 971, 980 (1986) (clarifying that the Restatement of the Foreign Relations Law of the United States concludes that international law imposes no obligation on states to avoid double taxation in the absence of an international agreement).

153. Commentators have challenged in the past the fact that countries sign tax treaties only to prevent double taxation. *See, e.g.*, Dagan, *supra* note 35; Braun & Zagler, *supra* note 35.

154. Let us remember that Mason's full taxation concept implies the prevention of double non-taxation. Mason, *supra* note 1, at 385.

155. *Supra* Part II.C (arguing that whilst double taxation arises from the exercise of sovereign taxing rights of two or more countries, double non-taxation is a consequence of the opposite); *see supra* notes 39–41 and accompanying text.

156. Parada, *supra* note 14, at 54 (arguing that unless some specific provisions are included within the tax treaties to ensure single taxation, "these instruments should not be interpreted in light of the broad tax policy goal of avoiding [double non-taxation]").

157. *Id*. at 84–94 (explaining that countries may indeed avoid double non-taxation through, e.g., subject-to-tax or switch-over provisions, or, on the contrary, pursue the outcome of non-taxation altogether through, e.g., tax sparing or matching credit provisions).

158. *Id*. at 104.

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countries, domestically or bilaterally (or even multilaterally), explicitly recognize such an aim as part of their domestic or tax treaty policies. Therefore, any suggestion that BEPS may reflect and effectuate a new international norm (*full taxation*), should be considered as unfeasible from a strict legal perspective, particularly because it disregards two important legal considerations. First, BEPS, as well as any other document emanating from the OECD, has no legally binding character. That is, countries are entirely free to adopt what the OECD recommends because all the OECD documents—including BEPS—are nothing more than recommendations without any legal binding effect.[159] This does not imply that countries may follow what the OECD recommends as if they were indeed following an international norm. If that were the case and if the international practice were sufficiently widespread among countries, we might be facing the origin of an international custom.[160] Yet, neither international practice nor *opinio juris*—the two elements of international custom—seem to be evident at this moment of time, as further discussed below.[161]

Second, in spite of the efforts to make the OECD look like an inclusive and democratic forum where countries are brought together on apparent equal footing to achieve consensus on tax matters, that

159. A similar example is what happens with the whole discussion regarding the OECD commentaries to the OECD Model Tax Convention. In this regard, see, for example, Hans Pijl, *The OECD Commentary as a Source of International Law and the Role of the Judiciary*, 46 EUR. TAX'N, May 2006, at 216, 224 (arguing that "[t]he Commentary cannot be considered to be a binding source of international law. It is a legally non-binding document, which has no bearing on the State as a whole, and only creates a moral obligation for the executive"). Likewise, Engelen, although supporting a theory that the OECD members and parties of a treaty would be bound by conduct to interpret and apply a treaty in accordance with the OECD commentaries, recognizes that the commentaries as such are not binding on the OECD member countries: "[W]hether the Commentaries *as such* are legally binding on the OECD Members countries, I fully endorse Mr. Ward's view that it should be answered in the negative." Frank Engelen, *Some Observations on the Legal Status of the Commentaries on the OECD Model*, 60 BULL. INT'L TAX'N: TAX TREATY MONITOR, Mar. 2006, at 105*; see also* VOGEL DTCS, *supra* note 92, at 48 m.no. 104.

160. This issue is further analysed *infra* at Part IV.B.

161. *See infra* Part IV.B.

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outcome is far from true.[162] In fact, it is not surprising to anyone that the OECD has always acted as an exclusive club where countries join by membership, and there are long and complex accession procedures once they are invited to join. All of this raises serious issues of legitimacy.[163] Even the "*Inclusive Framework*"—the new OECD sub-forum that invites all countries in the world to join the implementation of BEPS—appears to be more a strategy to keep the monopoly of the international tax developments than anything else.[164] Indeed, countries wishing to join the inclusive framework must commit to adopt the so-called "BEPS minimum standards" ensuring loyalty both to BEPS and the OECD.[165]

In sum, therefore, even though some may legitimately argue that BEPS reflect *full taxation*, this does not mean that BEPS itself is recognised as an international norm in its strict legal sense.

B. Full Taxation and Customary Law

Despite the original scepticism that *full taxation* might represent a new international norm in a strict international law sense, one may still adhere to the idea that *full taxation* might be considered international custom.[166]

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162. Mason, *supra* note 1, at 368, 382–83 (arguing that BEPS brought the G20 and OECD countries together "on an equal footing" but recognizing that the extent of influence that smaller and poorer countries may have on important agenda-settings or policy decisions is still to be seen).

163. *See, e.g.*, Tarcisio Diniz Magalhães, *What Is Really Wrong with Global Tax Governance and How to Properly Fix It*, 10 World Tax J., Nov. 2018, at 499.

164. Christians, *supra* note 1, at 1604.

165. Mason is also critical of the limited role of the Inclusive Framework when she says: "Relegating the Inclusive Framework primarily to peer review of implementation of BEPS 1.0 minimum standards would reinforce developed countries' control over international tax policy, while maintaining the appearance of inclusivity." Mason, *supra* note 1, at 383.

166. The concept of customary law should not be confused with the concept of "soft law," which has gained support in the international law doctrine. As provided in the *Encyclopedia of Public International Law*: "Soft law—a problematic notion in itself—comprises (if exists) rules which are neither strictly binding nor completely void of any legal significance. . . . But the notion of soft law presupposes the non-existence of the elements necessary

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Generally speaking, the formation of international custom requires the concurrence of two necessary elements. First is a *general state practice*—also known as the quantitative element of the customary international law—which assumes that a number of states must contribute, actively or passively,[167] towards the customary international rules.[168] Therefore, in opposition to a universal practice, the general practice becomes a bit more of a relative requirement, and it depends on how widespread is that practice as well as on its length of time.[169] Second, countries must have the conviction to follow a certain practice accepted

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for binding customary law." Rudolf Bernhardt, *Customary International Law*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 899–900 (Rudolf Bernhardt et al. eds., 1992). Regarding the use of the concept of soft law in international tax law, see, for example, Allison Christians, *Hard Law & Soft Law in International Taxation* (Univ. Wis. Legal Studies Research Paper No. 1049, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=988782 [https://perma.cc/7M2U-WHGU].

167. State practice also includes inaction or silence, especially, but not necessarily, where a protest would be expected. *See* Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMPAR. L. 305, 313 (2014). An example of passive State practice would be, for example, "acquiescence." As provided by the *Encyclopedia of Public International Law*: "The doctrine of acquiescence represents the proposition of binding effect resulting from passivity and inaction with respect to foreign claims which, according to the general practice of States, usually call for protest in order to assert, preserve or safeguard rights." Jörg Paul Müller & Thomas Cottier, *Aquiescence*, *in* 1 ENCYCLOPEDIA, *supra* note 166, at 14 (citations omitted). The acquiescence has also been recognized in the jurisprudence of the I.C.J. *See, e.g.*, Temple of Preah Vihear (Cambodia v. Thai.), Preliminary Objections, 1961 I.C.J. 17 (May 26); Temple of Preah Vibear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15); *see also* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Oct. 12).

168. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 29 (rev. 2d ed. 1997).

169. As provided by Brierly: "This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international, not to be susceptible of exact or final formulation." J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 61 (Humphrey Waldock ed., 6th ed. 1963); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (4th ed. 1990).

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as law and that, were a country to depart from the practice, some form of sanction would or ought to fall on it.[170] This is what is known in international law as o*pinio juris sive necessitates* or simply *opinio juris,* and it is indeed the core element of international custom.[171]

There is no doubt that countries in the international tax law community engage constantly in several practices, forming a dynamic process. This process is strictly connected with the development and complexity of the cross-border transactions, as well as with the introduction of new technologies and elements not originally considered in the realm of international businesses. For example, it was unthinkable in the past to conceive of a country taxing a business that lacked a physical presence there. Today, countries debate about ways to tax digital businesses precisely in those cases in which there is no physical presence in the country where the business is carried on.[172] It is not surprising that, within a few years, taxing digital businesses has

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170. Brierly, *supra* note 169.

171. The need of *opinio juris* in the formation of customary international law has been recognized even beyond the law discipline. In this sense, in an economic analysis of the formation of customary international law, Parisi establishes: "A mere behavioural regularity, lacking the qualitative element of *opinio iuris*, does not generate a customary rule. In legal jargon, such behaviour is a mere usage; in economic terms it simply represents an equilibrium convention." Francesco Parisi, *The Formation of Customary Law* 7 (Geo. Mason L. & Econ. Rsch. Paper No. 01-06, 2001), http://papers.ssrn.com/paper.taf?abstract_id=262032 [https://perma.cc/EKS4-4V6R]. Also, in traditional literature, Brownlie states in reference to the *opinio juris* that: "[I]t is in fact a necessary ingredient." Brownlie, *supra* note 169, at 7.

172. This debate has been led by the OECD and followed closely by specific measures proposed by the European Commission and by some individual states in Europe. *See* OECD, *Tax Challenges Arising from Digitalisation—Interim Report 2018* (2018), http://dx.doi.org/10.1787/9789264293083-en [https://perma.cc/U8X5-L9PQ]; *see also EC Corporate Digital Proposal*, *supra* note 78; *EC DST Proposal*, *supra* note 77. In the academic literature, see, for example, Brauner & Pistone, *supra* note 78; Georg Kofler et al., *Pragmatic*, *supra* note 78; Kofler et al., *Fixes*, *supra* note 78; Schön, *supra* note 78. Other scholars have tried to provide alternative meaningful solutions. *See, e.g.*, Auerbach et al., *supra* note 78; Avi-Yonah et al., *supra* note 78; Andrés Báez & Yariv Brauner, *Policy Options Regarding Tax Challenges of the Digitalized Economy: Making a Case for Withholding Taxes* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3167124 [https://perma.cc/7MNM-ZYQR]; Wells & Lowell, *supra* note 78.

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become a practice of states, which is a simple recognition that practices emerge at the same rate that they disappear. New challenges suppose new practices, as is the normal evolution of the international businesses and taxation as well. Moreover, common patterns of behaviour in cross-border transactions are repeatedly recognised over time, especially due to the wide range of bilateral tax treaties that use similar tax language and thereby create a certain amount of harmonized tax concepts. In many cases, these practices have sufficient criteria of generality and consistency to be regarded as state practice.[173] In other cases, however, this is doubtful.[174] Yet, one thing is evident: none of these practices can *a priori* be regarded as evidence of customary international tax law, unless there is proof that countries are convinced that they follow these practices as if they were accepted as law.

Nobody has gone so far as to argue that either the individual BEPS recommendations or the BEPS project as a whole represents international custom.[175] However, embracing the idea that BEPS may reflect and effectuate a new international norm—*full taxation*—indirectly raises the question of custom, the consequences of which are not only theoretical: if custom really exists, it would mean that countries would be obligated under international law to ensure *full taxation*,

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173. For example, residence and source, which are the traditional factors used by countries to trigger taxation.

174. For example, most of the countries use the exemption method to relieve double taxation. The exemption method purely applied does not consider how a determined item of income was treated for tax purposes in the source state; rather, it simply exempts the foreign income received by the resident taxpayer, avoiding double taxation. Therefore, it is possible that applying purely the exemption method, the income is finally not taxed anywhere. A few countries have introduced switch-over provisions in order to counteract what for them is a concern. However, it is hard to conclude that this is a well-settled international practice. Yet, a different interpretation could be achieved if the recent GloBE proposal is internationally and successfully adopted. As noted previously in this work, such a proposal involves not only the introduction of domestic provisions but the modification of tax treaties rules, including a *switch-over clause*, whose specific details are still unknown. See *supra* note 118 (in relation to OECD); OECD, *GloBE*, *supra* note 66.

175. *See supra* note 142 (discussing work of Prof. Avi-Yonah arguing in favour of the existence of customary international tax law).

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limiting their domestic tax policies and tax treaties, as well as bringing international responsibilities.[176]

A thorough answer to this question is beyond the scope of this Article. However, there are two general characteristics that this author recognises as *a priori* restrictions to conclude that custom may easily be formed in international tax law. These are as equally applicable to BEPS as they are to any other international tax practices, including *full taxation*.[177] First, most of the international tax law provisions are the result of ad hoc decisions, without clear and consistent principles, sometimes even contradicting each other. This is true even in the case of what we may consider the pillars of international tax law, such as the concept of residence. For example, while we could say that countries around the world have the generalised practice of not taxing directly the profits of a subsidiary abroad unless they are distributed as dividends to the parent company, particular ad hoc provisions known as Controlled Foreign Company (CFC) rules violate that premise and allow taxation of the foreign subsidiary's profits in the state of the parent company.[178] Similarly, while countries generally agree that the

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176. *See supra* note 142 (discussing work of Prof. Avi-Yonah arguing in favour of the existence of customary international tax law).

177. For a further analysis, see Leopoldo Parada, *Customary International Tax Law* (forthcoming; on file with author) (where the author elaborates on some arguments that would explain why the formation of custom in international tax law is still too complicated, proposing, however, some structural changes that may revert that process).

178. CFC regimes are used in many countries around the world to prevent erosion of the domestic tax base and to discourage residents from shifting income to jurisdictions that do not impose tax or that impose tax at low rates. In 1962 the United States was the first country to adopt rules that prevented local taxpayers from avoiding domestic income taxes by diverting their earnings to CFCs. *See* Revenue Act of 1962, Pub. L. 87-834, § 12, 76 Stat. 1006 *et seq.* (adding Subpart F; codified at I.R.C. § 951 (1962) *et. seq.*); *see also* Bittker & Lokken, *supra* note 146, at 69-3; James R. Hines, Jr., *The Case Against Deferral: A Deferential Reconsideration*, 52 Nat'l Tax J. 385, 387 (1999) (explaining that before adoption of CFC rules, firms would generally be subject to U.S. taxation only upon repatriation). For a recent historical review of the U.S. CFC rules, see Nir Fishbien, *From Switzerland with Love: Surrey's Paper and the Original Intent(s) of Subpart-F*, 38 Va. Tax Rev. 1 (2018). CFC rules were also one of the BEPS recommendations (Action 3) for countries to implement. *See* OECD, *Designing Effective Controlled Foreign*

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business profits of a non-resident will not be taxed in the source state, unless there is a physical presence, another ad hoc practice allows the source state to impose taxation under certain circumstances.[179] That is the reality of international tax law, which, like taxation in general,

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Company Rules, Action 3: 2015 Final Report (2015), http://dx.doi.org/10.1787/9789264241152-en [https://perma.cc/5TRY-ZERA]. For an analysis, see, for example, Mitchell A. Kane, *The Role of Controlled Foreign Company Legislation in the OECD Base Erosion and Profit Shifting Project,* 68 Bull. Int'l Tax'n, no. 6/7, 2014, at 321. In Europe, CFC rules are supranational law—they must be implemented by all Member States—according to the recent European Anti-Tax Avoidance Directive (ATAD), which implements most of the BEPS recommendations. *See* ATAD 1, *supra* note 130, art. 8. For an early analysis of the different measures included within the original text of the proposal for a directive, see Navarro et al., *supra* note 110.

179. This practice has already been codified in what is known as a "saving clause," a provision with a long-standing tradition in the tax treaty practice of the United States and that is now also part of both the 2017 OECD Model Tax Convention, *supra* note 50, and the Multilateral Instrument (MLI). OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Nov. 2016), https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [https://perma.cc/2MS5-V7ZQ]. In brief, the saving clause is aimed at ensuring the Contracting States' right to tax their own residents, regardless of the application of the treaty and to the extent no exceptions to the application of this provision apply. The best example of its application would be the case of a U.S. citizen who is not a tax resident in the United States and who renders services there without constituting a permanent establishment. Although the treaty between the United States and the state of residence of this person will seem to prevent the United States from taxing such person, this specific provision allows the United States to avoid its treaty obligation and to impose taxation, reflecting the ad hoc position that forms our international tax system. For literature about the U.S. saving clause, see H. David Rosenbloom & Stanley I. Langbein, *United States Tax Treaty Policy: An Overview*, 19 Colum. J. Transnat'l L. 359, 374, 383 (1981) (explaining that this provision remains as one of the cornerstones of the U.S. tax treaty policy); *see also* Daniel M. Berman, *Covering the World: The Expanding U.S. Tax Treaty Network*, 74 Taxes 1064 (1996). For the saving clause introduced in the OECD Model Tax Convention, see, e.g., Georg Kofler, *Some Reflections on the 'Saving Clause,'* 44 Intertax 574 (2016); Leopoldo Parada, *The OECD "Saving Clause": An American-Tailored Provision Made to Measure the World*, 78 Rivista Diritto Finanziario & Scienze Finanze 13 (2019). For an analysis of the MLI options for a saving clause, see Vikram Chand, *Should States Opt*

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seems to be a constant work in progress whose ultimate existence does not follow guiding principles but rather external factors such as economic crisis, political and popular perceptions, as well as the simple generation of revenues. In this context, it is difficult to argue without any probability of mistake that what is considered today a well-settled practice among states will remain as such in the times to come, potentially being recognised as custom.[180]

Second, international tax law practices generally lack a centralised tax discourse. This reflects an untestable international tax governance in which global tax policies depend exclusively on the influence and the role of non-democratic institutions that tend to self-attribute the guidance of the international tax discourse.[181] This lack of a centralised discourse directly influences the creation of custom. Indeed, if countries only respond to their domestic tax policies, it is evident that our international tax system will remain a set of ad hoc and reactionary rules attending to the specific interests and expectations created in a specific historical context, without helping the creation and maintenance of a consistent international tax practice.[182]

The path to recognise the formation of custom in international tax law is still equivocal. The absence of principled approaches, as well as the lack of a common international tax discourse are just examples of the foregoing. For this reason, the optimistic view of BEPS that Mason and other commentators suggest is a valid attempt to fill out the gap, understanding that bringing countries together in order to achieve

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for the Saving Clause in the Multilateral Instrument?, 86 Tax Notes Int'l 689 (May 22, 2017).

180. One should also not get confused by the fact some international tax practices may from time to time be codified as law. For example, almost all of the BEPS recommendations have been adopted in the European Anti-Tax Avoidance Directive (ATAD)—secondary EU law—including, e.g., CFC and anti-hybrid rules. *See supra* notes 130 & 178. In that case, however, the sense of obligation among countries emanates from the law itself—i.e., EU law—and not from the idea that even in the absence of an express provision these practices should be followed. In other words, the general practice of countries to implement CFC and anti-hybrid rules at a domestic level in Europe can only be attributed to a binding obligation that member states have regarding the implementation of EU law.

181. Christians, *supra* note 1, at 1604 (arguing that BEPS entrenches the OECD's monopoly over tax policy).

182. Parada, *supra* note 177.

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global consensus on tax matters should start from recognising some minimum common tax practices and principles.[183] However, agreeing that *full taxation* should be the torch used to illuminate that puzzling path remains still arguable.

V. Conclusions

Full taxation, or the idea that all of a company's income must be taxed in places where it has real business activities is, despite its seductive rhetoric, a conceptually inconsistent notion. This is reflected not only in the indeterminism of the concept, which is incapable of providing answers as to *where* taxation should finally occur, but also in its over-inclusive and pragmatic conceptual construction, the purpose of which appears to be only to legitimatise the use of coordinated provisions whose rationale exclusively attends to avoiding the complete absence of taxation in cross-border transactions. Ultimately, this suggests the unprincipled purpose of taxation just for the sake of taxation. Similarly, the absence of any international provisions prohibiting an outcome different than *full taxation,* let alone the existence of a consistent international practice recognized as law, prevents this author from agreeing that *full taxation* may be recognised today as a new international tax norm, with the caveat in relation to the effect that the dynamic development of international custom may take part in the future.

In sum, therefore, the core argument of this Article is not about our capability of achieving one day a systematic and principled international tax system (as some commentators envision today), but only that *full taxation* shall not play a normative role in that system, at least not if we do not want to block countries around the world wishing to attract real economic activities or to stigmatise permanently the outcome of double non-taxation. Choosing wisely the principles that will govern our international tax system will indeed be the key for a fairer system in which simplicity and coherence should definitely play a major role.

183. For those enthusiastic about BEPS, see references *supra* note 1.

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