White Paper 12

taxation

taxing the future

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1.

state of the art

At the time of the League of Nations in the 1920s, tax issues were essentially national and the focus was on the treatment of the company, the relationship between shareholders and companies, and treatment of investment flows across borders. Today, international and cross-border issues are predominant and affect all areas of taxation. Individuals and companies are not restricted to a particular country. Business, work and investment take place all over the world.

The founding principles of international taxation date from the 1920s and still apply. Since then, the sources of international tax law were progressively enriched by the construction of the international trade order. The acceleration of globalization and the digitization of the economy in the twenty-first century have led to increasingly sophisticated evasion and fraud schemes, which are costly to states and call for international tax reform. For the first time, these founding principles are entering in a transition period due to the changes that will result for large multinational enterprises from the political Two-Pillar agreement reached within the Organization for Economic Co-operation and development (OECD) in October 2021.

1. The founding principles of international taxation

Reports and first models issued from the League of Nations contained the founding principles of international taxation.

Reports and first models

The 1920s were marked by a crisis in public spending, caused by the war effort of the belligerent countries. To cope with this, some countries increased taxes, causing capital to flee. This is why the League of Nations was entrusted with various missions concerning double taxation (Brussels International Economic Conference of 1920) and the exodus of capital (Genoa International Economic Conference of 1922).

About fifteen reports were drafted by different groups of lawyers and economists. They still form the intellectual basis of the principles applicable to international taxation and contain the first architecture of the international tax conventions and models formally published for the first time by the OECD in 1963 and since modified.

Links to reports:

- Report on Double Taxation: Document E.F.S.73. F.19; April 5, 1923
- Double Taxation and Tax Evasion Document F.212 February 1925
- Double Taxation and Tax Evasion: Report; C. 216. M. 85
- League of Nations Double Taxation and Tax Evasion, C.562.M.178.1928.II.
- League of Nations Fiscal Committee: Report to the Council on the Work of the First Session of the Committee; C516.M.175.1929.II.
- League of Nations Fiscal Committee: Report to the Council on the Work of the Second Session of the Committee. C.340.M.140.1930.II.
- League of Nations Fiscal Committee: Report to the Council on the Work of the Third Session of the Committee C.415.M.171.1931.II.A.
- League of Nations Fiscal Committee: Report to the Council on the Fourth Session of the Committee. C.399.M.204. 1933.II.A.
- League of Nations Fiscal Committee: Report to the Council on the Fifth Session of the Committee C.252.M.124.1935.II.A.
- League of Nations Fiscal Committee: Work of the Fiscal Committee during Its Sixth Session C.450.M.266.1936.II.A.
- League of Nations Fiscal Committee: Report to the Council on the Seventh Session of the Committee. C.490.M.331.1937.II.A.
- League of Nations Fiscal Committee: Report to the Council on the Work of the Eight Session of the Committee. C.384.M.229.1938.II.A.
- League of Nations Fiscal Committee: Report to the Council on the Work of the Ninth Session of the Committee. C.181.M.110.1939.II.A.
- League of Nations Fiscal Committee: Report on the Work of the Tenth Session of the Committee. C.37.M.37.1946.II.A.
- League of Nations Fiscal Committee London and Mexico Model Tax Conventions Commentary and Text. C.88.M.88.1946.II.A.

The content

In the 1920s, the economy was essentially material. As tax rates rose in various countries, the elimination of double taxation became a key treaty objective, as it was a real economic barrier to global trade. These contextual elements largely explain the principles of the 1920 compromise.

Under Seligman's leadership, the League of Nations advocated a system of economic allegiance in its 1923 report, based on the individual's ability or economic capacity to pay[1]. The economic criteria should determine where a taxpayer should pay taxes and take into account four basic considerations of wealth: acquisition (the place of origin), location (the situs), chargeability (the place of enforcement of legal rights) and consumption (the residence or domicile). For companies, the criterion used for tax jurisdiction is a physical link, either the presence of an individual (a dependent agent) or a physical presence of the company itself (an establishment). Thus, the search for a permanent establishment or a fixed place of business has appeared to be decisive in marking the presence of a factory, a warehouse or physical goods, as well as that of a physical person representing the company, in a territory. This territorial location allows the tax authorities established there to collect part of the wealth generated.

At the time, taxation was essentially national, the need arose to limit the autonomy of private parties to organize their affairs across borders. For multinational enterprises, or groups of companies, the arm's length principle was intended to prevent the indirect transfer of profits from a country to another with a privileged tax status, through the manipulation of «transfer prices», which are the prices set between related companies within a group at the time of transfer of goods or services. Indeed, these affiliated companies must respect an «arm's length» price, i.e. the price that would have been set between two independent companies, in order to avoid distortions of competition between countries. This structural benchmark is important and sometimes the reference concerns the conditions between independent parties (e.g. the French current commentary on article 9 of the OECD model convention). Finally, the original distribution of wealth is based on a fundamental distinction between source jurisdictions (the state where the wealth is produced) and residence jurisdictions (the state of the beneficiary of the

Note 1 For a renewed vision of this concept, see the progress of phase 2 of the ILA working group on International Tax Law on the "Division of taxation rights (nexus)", chaired by J. Kokott and P. Pistone: https://www.ila-hq.org/index.php/study-groups

wealth). Thus, passive income (investments) is primarily taxed in the residence state while active income (business) is taxed in the source state. For natural persons, the League of Nations works have rather decided in favor of taxation in the state of residence.

Originally, treaties were mostly bilateral and mainly between European countries (there were few treaties applicable elsewhere in the world until the middle of the twentieth century). Bilateralism prevailed over the various multilateral attempts, reflecting a contractual logic that best preserved the will of the state parties. In the absence of a dispute resolution system embedded in a specific international body, mutual agreement procedures (MAP) have emerged as an innovation placing on states only an obligation of means and allowing tax authorities to establish a formal dialogue without recourse to diplomatic instruments or an international jurisdiction. Tax arbitration is part of this extension, since it takes place between states with consequences for the taxpayer.

2. Enrichment of sources

After Second World War, economic reconstruction led to the emergence of global and regional organizations (sometimes with their own jurisdiction), but also to the strengthening of international cooperation and the desire of states to return to free trade. During this period, negotiations to create a framework for free international trade began, from which the Global Agreement on Tariffs and Trade (GATT) was born, and subsequently the World Trade Organization (WTO), in order to reduce barriers to international trade in goods, and settle trade disputes between nations. Other international institutions such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) and then Word Bank emerged to assist in economic reconstruction, manage sovereign debt and enhance global cooperation in response to economic crises, together with the global forum of the United Nations. The European economic order was built in parallel with this new international economic order. Similarly, the construction of the European Union (EU) with the European Coal and Steel Community (ECSC) Treaty was started, which lays the foundations for European integration. This evolution has led to the diversification of international, European, and national sources, and their interaction.

International sources

Concerning international tax law, two kinds of international sources must be distinguished: general treaties[2] relevant for tax matters and tax treaties and models of double tax treaties.

General treaties relevant for tax matters

General treaties apply to international tax matters unless there is a specific tax carve-out, following the adage *Specialia Generalibus Derogant*. Several general treaties apply in this context. To start with, after Second World War, GATT Agreements (1947) established the conditions for fair trade on goods, and subsequently services, enabling free competition within a multilateral and liberal framework, in order to ensure equal treatment of economic agents on the market (http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf). States agreed on the principles of free trade and a customs union. All these principles will serve as the basis for the elaboration of the GATT of 1994 and the creation of the WTO, which covers international trade in goods as well as trade in services, intellectual property and even international investments (https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf). The impact of the GATT Agreements remains very important in terms of direct and indirect taxation.

Other general treaties are relevant for tax matters as:

- the Universal Declaration of Human Rights: https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf;
- the UN International Covenant on Civil and Political Rights of 1966: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights;
- the UN International Covenant on Economic, Social and Cultural Rights of 1966: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights)
- the Vienna Convention on Diplomatic Relations of 1961: (https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf);

Note 2 We use the term «general» to describe international treaties that do not have taxation as their primary purpose, as opposed to conventions that have taxation as their specific purpose.

- the Vienna Convention on the Law of Treaties of 1969 (https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf);
- bilateral investments treaties (https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties) or multilateral ones (e.g the Energy Charter Treaty https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf).

Some states also decide to promote their economic relations through regional inter-state agreements in three main forms. First, free trade agreements as the North American Free Trade Agreement (NAFTA) enacted in 1994 and replaced by the US-Mexico-Canada agreement (USMCA) in 2020 (https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between). Second, the customs unions as the Benelux Economic Union treaty in 1958 revised in 2008, which has its own court of justice (1958: https://wipolex.wipo.int/en/text/242221, 2008: https://wipolex.wipo.int/fr/text/242224). Finally, common markets which aim at eliminating tariff and non-tariff barriers to trade in order to promote free movement as experienced by the Mercosur countries or the Andean group.

Tax treaties and models of double tax treaties

As early as 1948, the Organization for European Economic Cooperation (OEEC) was charged with distributing the funds of the American Marshall Plan for the reconstruction of Europe and with intensifying intra-European trade by lowering customs duties or other obstacles to the development of trade and ensuring the creation of a customs union or a free-trade zone. In 1961, the OEEC becomes the OECD, which remains the driving force behind international tax changes. The end of the 1990s marked the beginning of a systematic effort by the OECD to promote transparency, focus on mutual assistance at the global level and consider how best to respond to tax base erosion and profit shifting techniques. As early as 1998, an important work on harmful tax competition was published (https://www.oecd-ilibrary.org/docserver/9789264162945-en.pdf?expires=1654247048&id=id&accname=ocid177424&checksum=79360E34859DB3A55146EE9DC8CBE309) and recommendations have been made to combat tax evasion and avoidance through the establishment of a list of uncooperative «tax havens». These recommendations have led some countries to commit to the implementation of transparency and information exchange standards.

The OECD enacted the first model tax convention on income and capital in 1963. Until 1992 the Model was updated with limited frequency, mainly due to a will of stability. Then the OECD started increasing the size of the commentary of the treaty clauses, with almost annual updates. The last update of the model was in 2017 (https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf). Many bilateral tax treaties are based on this OECD model, which reflects the interests of the developed countries with a favor given to the residence country. In contrast, the UN model developed to apply specifically for treaties between developing countries and developed countries reflects the interests of developing countries with preference given to the source state. The idea is to give more tax revenue to the source states, in which the investment or activity takes place, whereas the OECD model favors the state of residence of the investor, or the state where the activity is conducted. The UN model was enacted for the first time in 1979, last updated in 2021 (https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2022-03/UN%20Model_2021.pdf). In reality, the OECD model has more influence on bilateral tax treaty practice than the UN model, although some clauses in the UN model remain influential, such as Article 12 on royalties.

In addition to the OECD and UN model treaties, regional models have also been developed that promote the interests of countries located in the same economic or geographic area such as the African Tax Administration Forum model, with commentaries (ATAF: https://events.ataftax.org/events/index.php?page=documents&func=view&document_id=7). Some countries have even designed and published they own national tax model, such as the U.S. Model Tax Convention which is publicly available, updated periodically and accompanied by so-called technical explanations (https://home.treasury.gov/system/files/131/Treaty-US-Model-2016_1.pdf).

Finally, there are some specific multilateral tax treaties. One of the earliest multilateral double taxation tax treaties was signed in 1922 between Austria, Hungary, Italy, Romania and the Kingdom of the Serbs, Croats and Slovenes, because of the end of the Austrian-Hungarian empire. Then, other conventions emerged within the framework of the UN, such as the UN Multilateral Convention on the Taxation of Road Vehicles for Private Use in International Traffic of 1956 (https://treaties.un.org/doc/Treaties/1959/08/19590818%2001-46%20AM/Ch_XI_B_10p.pdf). Today, one of the most important examples among tax treaties in force is the Nordic Multilateral Convention entered into force in 1998. Its goal is to facilitate the development

of a common approach to cross-border tax issues among countries that broadly share a similar international tax policy, have similar needs and very strong economic relations. However, the numerous bilateral clauses contained in it confirm the essentially bilateral nature of tax treaties (http://international-taxtreaty.com/download/Sweden/DTC/Sweden-Iceland-DTC-Sep-1996.pdf). Other multilateral tax conventions have been developed under the aegis of international organizations with a different object and purpose, namely to create a global approach to issues requiring a common set of rules. In such circumstances, bilateralism rightly gives the way to multilateralism. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters developed by of the OECD and the Council of Europe in 1988 and amended in 2010 is one of the most widely adopted multilateral convention (https://www.oecd.org/tax/exchange-of-tax-information/ENG-Amended-Convention.pdf). It has a very broad impact, with more than 140 jurisdictions participating, and has revolutionized international tax administrative cooperation.

European sources

After Second World War, there was a strong international will to create a common economic, democratic and legal space in order to define and guarantee fundamental rights and to liberalize exchanges. The tax prohibitions in the first European treaties, in particular in the European Economic Community (EEC) treaty, were originally based on the free movement of goods (prohibition of tariff, non-tariff agreements and protectionism) and were expressly aimed at indirect taxation. Faced with the persistence of obstacles to the free movement of people and goods, the European Single Act (1986) called for the full realization of the internal market, and the Maastricht Treaty (1992) laid the foundations of the European Union and the single currency by establishing convergence criteria to ensure economic stability in the euro zone. From there, the European court of justice has progressively given a tax content to the fundamental freedoms and to competition law, in the field of direct taxation, by interpreting the non-tax provisions of the treaties. The general idea is that direct or indirect taxation must not be an obstacle to the free movement of persons, services and capital. Since the late twentieth century, economic globalization has accelerated. The development of free trade policies, disintermediation and financial deregulation have encouraged this

expansion. Within current European rules a distinction can be made between two kinds of sources impacting tax matters, related to the European union (EU) rules and the European Convention on Human Rights (ECHR).

European Union (EU)

The objective of the 1957 Treaty of Rome is to create for member states an area of free movement of goods, services, people and capital through an economic integration, a common market, and some customs union involving the setting up of a common customs tariff, recalling the same categories as in international law. Third states are also taken into account as they may belong to different European economic areas (European Economic Area- EEA, European Free Trade Association with its own Court of Justice - EFTA, customs unions, free trade agreements or the Schengen area). Some third countries, such as Switzerland, decided to conclude mixed agreements with the EU.

Concerning primary law, the constitutive treaties provide for two kinds of obligations. On the one hand, an obligation to do - the so-called 'positive integration' (harmonize, eliminate double taxation and cooperate). On the other hand, an obligation not to do - the so-called 'negative integration' (not to discriminate with freedoms and not to grant state aid incompatible with the internal market), which has broadly affected the development of European tax law since the mid 1980's. The obligation to eliminate double taxation provided by the article 293 of the European Community Treaty has been repealed. Since the entry into force of the Lisbon Treaty in 2009, the EU is governed by three main texts:

- the Treaty on the EU (https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A02016M%2FTXT-20200301),
- the Treaty on the Functioning of the EU (https://eur-lex.europa.eu/eli/treaty/tfeu_2012/oj),
- the European Charter of fundamental rights, which has the same legal value than the constitutive treaties (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT).

The Treaty on the EU has added a non-economic dimension, which broadens the framework in which states have surrendered their sovereignty from the national to the supranational level.

In this context, an EU taxpayer has the right to exercise four fundamental freedoms: the free movement of persons (Art. 45 TFEU), the freedom of establishment (Art. 49 TFEU), the freedom to provide services (Art. 56 TFEU) and the free movement of

capital and payments (Art. 63 TFEU). With regard to the latter freedom, the EU wished to liberalize the cross-border movement of capital and payments on a unilateral basis, which leads to third-country nationals being offered protection similar to that of EU nationals in this area.

Concerning secondary law, unilateral acts (e.g regulations, directives, decisions, opinions, recommendations, code of conduct on company taxation) and conventional acts (international treaties signed by the EU, agreements between member states or between institutions) are also relevant in tax matters.

The first directives in tax matters concerned:

- the harmonisation of legislation of Member States concerning turnover taxes in 1967, causing a change of model from taxation based on cumulative turnover to taxation of added value: (First directive: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31967L0227&from=FR and Second directive: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31967L0228&from=FR). The 6th directive on a common system of value added tax (VAT) in 1977 establishing common rules for determining the taxable base (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977L0388&from=FR, was updated in 2006: https://eur-lex.europa.eu/eli/dir/2006/112/oj),
- indirect taxes on the raising of capital in 1969 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31969L0335&from=FR, replaced in 2008: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0007&from=FR).

In contrast to indirect taxation, the direct taxation falls under the exclusive competence of the member states. Consequently, the harmonization of direct taxation is carried out on the basis of directives under Article 115 TFEU. The first directive on direct taxation was related to mutual assistance in 1977 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977L0799&from=FR), replaced in 2011 by a directive on administrative cooperation (DAC) which extends the mechanism of information exchange between member states (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0016). Then, at the beginning of the 1990s, three directives were adopted concerning a common tax regime applicable to mergers, divisions, transfers of assets and exchanges of shares between companies of different member states:

- the merger directive: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31990L0434&from=FR)
- the Parent-Subsidiary directive: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31990L0435&from=FR, now replaced: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0096&from=FR),
- the European Arbitration Convention: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41990A0436&from=fr), to the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

These texts, combined with the 2003 Directive on interest and royalty payments made between associated companies of different member states (The Interest-Royalty Directive:https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0049), allow the free movement of companies and capital within the EU.

Since these first texts, some significant steps have been taken. First, to go beyond the European Arbitration Convention limited to some companies, a more general EU tax dispute resolution mechanism was enacted in 2017 which covers disputes arising from the interpretation and application of tax treaties concluded between Member States (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L1852). Second, the number of directives on administrative cooperation is increasing as DAC 7 related to the reporting obligations of digital platforms within the EU has been adopted in march 2021 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021L0514&from=FR). The same is true concerning anti-tax avoidance directives (ATAD) to reinforce the fight against tax avoidance practices that directly affect the functioning of the internal market, with 2016 ATAD 1 related to deduction of financial charges (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016L1164&from=FR) and 2017 ATAD 2 providing for anti-hybrid rules (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0952&from=fr). The cooperation has also been reinforced within tax administrations by a specific directive on mutual assistance for the recovery of claims relating to taxes (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L0024). Finally, the creation of a common consolidated corporate tax base (CCCTB) for European groups of companies seems to take a new turn since the 2011 proposal for a directive (https://ec.europa.eu/taxation_customs/system/files/2016-09/com_2011_121_en_0.pdf), with the Communication of 18 May 2021 on "Business taxation for the 21st Century" (https://ec.europa.eu/taxation_customs/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf).

The EU has recently begun to outline a common approach to the problems of combating "tax havens". Following the example of international law, a European list of uncooperative jurisdictions for tax purposes was created in 2017, updated in 2022 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XG0303(01)&from=FR), which does not necessarily correspond to the national lists published by a number of countries (e.g. for France: https://www.legifrance.gouv.fr/download/pdf?id=amKv-7g5rLaQSeNDDlhzB1o7HqWR6wDUo19VGpmA_28=). Finally, in order to establish a uniform response to tax evasion to prevent and counteract this phenomenon, two directives have also been proposed to end the misuse of shell Companies - the so-called ATAD 3 (https://ec.europa.eu/taxation_customs/system/files/2021-12/COM_2021_565_1_EN_ACT_part1_v7.pdf), and to ensure a global minimum level of taxation for multinational groups in the Union (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0823).

European Convention on Human Rights (ECHR)

The ECHR was signed on 4/11/1950 and came into force in 1953 (https://www.echr.coe.int/documents/convention_eng.pdf). This convention has an impact on tax matters for tax disputes related to civil and criminal law, on the basis of Article 6 §1 of the right to a fair trial. Other grounds can be invoked, such as article 1 of the first protocol entitled «Protection of property» or article 14 on non-discrimination if combined with another provision of the Convention. The European Court of Human Rights, established in 1959, has rendered several important judgments concerning searches, the principle of the individual nature of penalties, the retroactivity of tax law, legitimate expectations or the combination of administrative and penal sanctions.

The ILA Working Group on International Tax Law has defined three types of tax impact, relating to procedural, substantive and penalty rules[3]. With regard to procedural rules, the strong interaction between administrative and judicial tax procedures is such that there is no right to a fair trial without a right to a

Note 3 See phase 1 of the working group "Public international law and tax law: taxpayers' rights", and the book dedicated: Taxpayers in International Law: International Minimum Standards for the Protection of Taxpayers' Rights, J. Kokott and P. Pistone (Dir), Hart Publishing, 2022.

fair administrative tax procedure. As for the substantive rules, the group identifies two main axes. On the one hand, with regard to data protection through the right to privacy, it is necessary to find a balance between the right of tax authorities to have full access to taxpayer documentation in order to exercise their right to conduct audits, and the protection of taxpayers against the public disclosure of data, as is the case with certain recent measures (e.g. public Country by Country Reporting - CbCR). On the other hand, with respect to property right, the problem of confiscatory taxation remains difficult to resolve when such effects are produced by the parallel exercise of two tax jurisdictions, giving rise to international legal double taxation. Finally, with regard to sanctions, the group concludes that there is a high degree of legal uncertainty with regard to the levying of surcharges, penalties, administrative and criminal sanctions, and proposes a specific interpretation of the 2016 case A & B *vs* Norway case as to the *non bis idem* principle (https://hudoc.echr.coe.int/tur - {"itemid":["001-168972"]}).

National sources

International tax rules are established in domestic law, according to the legal system of each country: common law, civil law, mixed law, monist or dualist systems. All states take into account in their own way the different elements of international taxation, i.e. the neutrality of imports and exports of capital, and legal elements such as the principles of nationality (residence) and territoriality (source). In each country, taxation is generally related to the constitution, statutes, regulatory and administrative sources and case law. Thus, the implementation and the interpretation of international tax rules and European tax rules depends on each country.

Regarding tax treaties, the treaty network is more or less extensive depending on the country. For example, France has one of the most extensive tax treaty networks (about 130) compared to Australia (about 45). For a country, to sign tax treaties usually means surrendering a part of its right to exercise the tax sovereignty. This is particularly true for the capital importing countries and in general the developing countries which give up their right to tax at source by means of tax treaties.

In the absence of an international tax court or dispute forum, international tax disputes are resolved in domestic courts (between taxpayers and national tax authorities) or, if between states, on the basis of a MAP or through arbitration mechanisms generally based on tax treaties. If the procedure fails or if there is no double tax convention, the taxpayer may be taxed twice

or not at all. In this case, the national judge can act depending of the content of the law. Some international or European bodies are also competent in tax matters. It is the case for instance of the EU Court of justice, of the ECHR Court, of the BENELUX and the EFTA courts, but also of the Dispute Settlement Body (DSB) of the WTO. Finally, the system of preliminary rulings within the EU allows this dialogue between national judges and the judges of the Court of Justice. The dialogue also arises from the interaction of sources between international and European norms, but also within European rules between different normative orders such as the ECHR and the EU.

3. International tax reform

During the financial crisis of 2008-2009, governments felt the need to increase their tax revenues and close loopholes in the existing international tax system, in order to make it more difficult for profits to be shifted to preferential tax jurisdictions. This was one of the reasons for the international tax reforms, launched in 2013 by the OECD and the G20, and agreed as part of the Base Erosion and Profit Shifting (BEPS) project. The most recent result of this reform is the political "Two-Pillar" consensus statement of 8 October 2021.

The reasons

The free movement of goods, people and capital or payments allows for a better flow of wealth. It is now easy to set up a structure in one state, using the infrastructure of other states, and to transfer intangible assets to other jurisdictions. The concepts that came out of the 1920s compromise are no longer appropriate for our time. The new era is that of the digitization of the economy, in a pandemic context where the wealth produced by digital companies has continued to grow, in jurisdictions without a physical presence. There is now a disconnect between the factors of production, the value factors that are paid in the production chain, and the territory. The taxable material is detached from the territory and the taxable bases of the states are eroded.

A key challenge is the growth of the value and spread of intangible assets which today represent great wealth for companies, especially for multinational enterprises. Intangible assets, and transactions dealing with them, pose significant difficulties in valuation. Prices and the legal form of intangible assets may be more easily manipulated than for physical goods, due to their main characteristics: mobility and dematerialization. These assets can be located in an arbitrary way, separated from physical production in value chains, in countries around the

world. This generates opportunities for tax planning, including the artificial location of intangible assets and related profits in low tax jurisdictions, causing profit shifting and tax base erosion for states in which the companies are traditionally based. Current tax rules do not take into account the way multinational enterprises operate today in a globalized and digitalized world.

The impossibility of taxing digital companies on the basis of current principles and the difficulty of finding a rapid global consensus has pushed many states to go outside their bilateral tax treaties to create specific taxes on digital companies, especially the digital giants Google, Apple, Facebook, Amazon and Microsoft (GAFAM).

For example, the United Kingdom adopted a Diverted Profits Tax on April 1, 2015, while India has implemented in 2016 an Equalization Levy targeting digital transactions made by non-residents. Many countries have introduced taxes on digital services, including Austria, Italy, the United Kingdom and France, in the form of a turnover tax. In Brazil, the situation is very complex, as the law is not clear about the nature of the digital goods marketed (goods or services) and there are two different tax treatments (state VAT on goods and municipal tax on services), which creates a collection conflict between the state and municipalities. This situation scares off investors and causes constitutional difficulties. For its part, the UN has enriched its tax model by integrating an article 12B specifically dedicated to income from automated digital services, showing that it is difficult to find a common position.

The founding principles are not effective in combating the sophistication of tax avoidance schemes in a globalized world. The main challenge remains with MNEs due to tax planning or legal tax minimization. The limits of these principles in a context of ever more harmful tax competition have caused states to lose revenue. This reality caused the reform.

The Base Erosion Profit Shifting (BEPS) Project

The OECD and G20 BEPS project was launched in 2013 with 15 actions that aim to close these gaps in the international tax system (https://www.oecd.org/tax/beps/beps-actions/). Within the framework of these actions, the implementation of this reform is done through a series of national and international measures. The modification of bilateral tax treaties is done through the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the Multilateral instrument or the MLI), which was opened for signature on June 7, 2017 at the OECD, with 99 signatories as of June 28, 2022 (https://www.

oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf). The Multilateral instrument was specifically created to implement the reform, in order to modify the applicable bilateral tax treaties without going through an amendment. It will remain a tool for coordinating and modifying existing tax treaties on an ongoing basis, without autonomous applicability. The most important multilateral elements of this instrument are the common minimum standards that all states must implement in particular on treaty abuse and the resolution of international tax disputes. Thus, Article 6 requires a change in the preambles of treaties to specify the objective of eliminating double taxation without the possibility of non-taxation or reduced taxation through evasion, fraud or avoidance practices. On the other hand, Article 7 involves the implementation of anti-abuse mechanisms, in the form of a subjective test called the Principal Purpose Test (PPT), or a simplified Limitation of Benefits (LOB) clause. In addition, many states have chosen to implement mandatory arbitration on a last-best-offer basis. However, while many countries have signed and ratified the MLI, there is wide variation in their selection of bilateral tax treaties to be "covered" by the MLI, and diversity in the particular articles adopted or reservations made under the MLI itself.

"Two-Pillar" Consensus Statement of 8 October 2021

Given the importance of this reform and the fact that the OECD is composed of only 38 member states, it was decided to extend the negotiations in a so-called "Inclusive Framework" of the BEPS project. On November 2021, 137 of 141 member states in the Inclusive Framework agreed to the October 8, 2021 Statement. The four Inclusive Framework countries that have refused to sign the Consensus Statement are Kenya, Nigeria, Pakistan and Sri Lanka. To date, more than 50 countries around the world have not joined the Inclusive Framework and therefore have not accepted the Declaration. While international tax coordination under the reform pursues broadly desirable objectives, it nevertheless deprives states of the substance of their sovereignty.

To prepare the political agreement and to accompany the discussions, the OECD published in October 2020 two technical documents presented in the form of «pillars», called «blueprints». The first pillar concerns the allocation of taxing rights for the largest global multinational enterprises (MNEs). The second pillar concerns the implementation of a global minimum tax on large MNEs. The October 8, 2021 Statement on a "Two-Pillar Solution to Address the Tax Challenges Arising from the Digita-

lization of Economy" maintains this two-pillar structure (https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf).

Pillar 1: allocation of taxing rights for the largest global multinational enterprises

The first pillar is intended to tax very large and profitable multinational enterprises that generate revenues in «market jurisdictions», whether or not there is a physical presence. The first element («Amount A") will allow market jurisdictions in which goods or services are ultimately used or consumed to tax 25% of MNE group profit above a threshold of 10%, calculated at the group level. The MNE groups covered by Pillar 1 have worldwide turnover in excess of €20 billion and profitability in excess of 10%. The extractive and regulated financial services industries are excluded. This pillar is the result of a compromise, since some countries wanted a focus on the digital economy (United Kingdom), while others wanted an application to the whole economy (United States). The result implements the US approach of covering all of the largest global MNEs whether or not they are "tech" companies.

Under Pillar 1, for Amount A, financial accounting, with adjustments, is applied to calculate revenues and profits of the corporate group. For a market jurisdiction to be able to levy tax on Amount A (at its corporate tax rate), the MNE must generate at least €1 million in revenues in that jurisdiction. The threshold is lowered to €250,000 for jurisdictions with a gross domestic product (GDP) of less than €40 billion. The second element («Amount B») proposes a simplified approach to the arm's length principle for core marketing and distribution activities within countries, to focus on the needs of low-capacity countries. The details of Amount B are not yet disseminated and are still under negotiation. Pillar 1 also includes dispute avoidance and resolution mechanisms to prevent double taxation in relation to Amount A, with an optional mechanism for developing countries. Finally, to prevent trade disputes, Pillar 1 requires the elimination of taxes that are not calculated on profits, such as digital services taxes or other relevant similar measures, yet to be defined in detail.

A series of public consultation documents have been published in 2022 related to:

- new mechanisms for MNEs to obtain certainty on various aspects of Amount A (https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-certainty-framework.pdf),
- a mandatory and binding dispute prevention and resolution mechanisms for in-scope MNEs and an elective one for certain developing economies (https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-certainty-issues.pdf),
- the regulated financial services exclusion (https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-regulated-financial-services-exclusion.pdf).

The modalities and timetable for the implementation of this pillar have been delayed since the finalization of the multilateral convention has been postponed by one year, to mid-2023, for an entry into force in 2024, while the result of the work on Amount B is to be presented by the end of 2022.

Pillar 1 has already had a political effect concerning the elimination or "freezing" of unilateral digital services taxes. In October 2021, Austria, France, Italy, Spain and the United Kingdom signed a transition agreement with the US, pending the formalization of the multilateral instrument of Pillar 1 that will take effect in 2024.

Pillar 2: a global minimum tax on large multinational enterprises

The second pillar aims to implement a global minimum tax of 15% on corporate profits no matter in which jurisdiction they are derived around the world. This rule authorizes states to levy an additional tax on the foreign profits of companies headquartered in their jurisdiction, where the minimum effective tax rate is not achieved in other jurisdictions. MNEs that fall within the scope of Pillar 2 have a turnover of at least €750 million, with some exclusions including public entities, international organizations, non-profit organizations, pension funds, investment funds and income from international shipping activities.

Pillar 2 will be implemented by domestic tax law reform in line with model rules promulgated by the Inclusive Framework. There are two interrelated domestic rules, together referred to as the global base erosion rules (GloBE). In addition, there is a proposal to enable some countries to enact a treaty rule called

the Subject to Tax Rule (STTR). The domestic rules (GloBe) include first an income inclusion rule (IIR), which allows the jurisdiction where a parent company is located to tax the profits of one of its entities that is taxed at below a 15% effective tax rate in its jurisdiction. Second, GloBE includes an under-taxed payment rule (UTPR), which operates where the IIR has not worked, to disallow the deductibility of intra-group payments from the low-tax jurisdiction. The IIR is expected to supplement the Controlled Foreign Corporation (CFC) rules of the parent country. In some respects, the IIR is similar to the US CFC rules in its Internal Revenue Code Subpart F.

The treaty-based STTR allows some developing country source jurisdictions a right to tax outbound payments by MNEs to low tax jurisdictions, where such payments are taxed in the receiving jurisdiction below a nominal rate of 9%.

The GloBE rules are not prescribed by a treaty and states are not obliged to adopt them. This is a «common approach». In fact, the timetable is already outdated, since a transposition into law in 2022 was initially proposed for an effective entry into force in 2023, or in 2024 for the rule on under-taxed payments. For the treaty rule, a multilateral instrument was to be developed before mid-2022. This calendar will therefore be delayed, as for Pillar 1. For the time being, only a public consultation was opened for the period 14 March – 11 April 2022 about the implementation of the GloBE by tax administrations and MNEs with the publication of the commentary to the GloBE rules (https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-commentary.pdf) and illustrative examples (https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-examples.pdf).

4. In transition

Pending the drafting of a multilateral convention to enable Pillar 1 reform to be implemented, and the Model Rules enabling Pillar 2 to be implemented, political negotiations are continuing between member states in the Inclusive Framework. While the US has been supportive of the Two-Pillar Solution, it remains in a complex position. In this regard, some observations can be made on the American paradox, the incremental reform and on whether or not there is a multilateral shift.

The American paradox

Aspects of the Two-Pillar international tax consensus were inspired by US tax reforms, including Trump's 2017 tax reform (Tax Cuts and Jobs Act, 22/12/2017). With this national reform, the US led the way with the introduction of two anti-base erosion measures:

1) Global Intangible Low Taxed Income (GILTI, new Internal Revenue Code -IRC- section 951A) which introduces a minimum tax on intangible income booked in foreign countries to discourage profit shifting,

2) Base Erosion Anti-Abuse Tax (BEAT, new IRC section 59A) which creates a minimum taxation of US companies to avoid relocation.

However, they do not participate in the international tax reform. Consequently, the old principles remain and the need will soon be to articulate the multilateral instruments with existing law. In this regard, it is interesting to note that the October 8, 2021 statement referred to this difficulty. Indeed, a specific point in Pillar 2 is entitled «Coexistence with the GILTI regime». The declaration states that particular attention will be paid to the coexistence of this US regime with the GloBE rules, to ensure a «level playing field».

A particular issue is how to implement the Pillar 1 multilateral reform enabling Amount A to be taxed. Some members of the US Congress consider the proposed convention to be a «treaty» under the US Constitution, which means that it cannot enter into force without the consent of a two thirds majority of the US Senate. The adoption of the agreement is not yet certain, since mid-term elections will be held in the fall of 2022, which will renew the House of Representatives in Congress and more than one-third of the Senate. These electoral outcomes will have implications for US support for international tax reform.

However, the approach taken by the US may also be a way to maintain sovereignty over the international tax standard, as they have finally negotiated the adaptation of their national rule to have an equivalent of the rules contained in the reform. However, GILTI is not the standard that has been negotiated internationally and does not represent the equivalent of the principles negotiated internationally within the inclusive framework of the OECD. This is a concern for foreign companies who wonder whether U.S. companies will have to provide the same information as required by the international tax reform, which binds all foreign companies whose states have signed up to the reform. At the time of writing, discussions are underway regarding changes to U.S. legislation to make it compatible with

the Two-Pillar solution. While governments can act very differently on the same common intent, there is also a risk that the US tax rules will not align with the broader Two-Pillar consensus, leading to continued uncertainty and a breakdown in multilateralism.

Incremental reform

The Two-Pillar reform, if implemented, will add new elements to the old international tax principles. The right to tax of the «market jurisdiction» and the application of tax on financial accounting profits of the global MNE are new, but will only apply to the very largest global corporations. The difficulty is that the reform does not solve the fundamental problems of the current rules. Adding new principles without addressing the dysfunctions of the existing system does not allow for easy progress.

The reform did not explicitly address international tax law fundamentals including separate accounting of entities in a corporate group (apart from Amount A for the largest MNEs), the creation of subsidiaries, the attempt to tax subsidiaries where they make their profits, the distinction between active and passive income, the shifting of intangibles to tax havens, the payment of royalties or the setting of the arm's length price.

The concept of «value creation» reflecting the idea of taxing where the value is created remains unclear and it does not correspond to the description of the existing system. It is unclear whether the logic can be applied more broadly to reform international corporate tax rules. Historical attempts to allocate benefits to different parts of an integrated global supply chain have not succeeded. These have led to the use of proxies such as assets, labor, or others, to find a basis for allocation. This concept of «value creation» is ambiguous as the principle of the reform is to tax in the place where the value is created, whereas it's not the case in a tax heaven, because there is no value creation in such a place. One of the fundamental problems with the current system is that by trying to tax where the economic activity is, we are trying to tax something that is relatively mobile.

Beyond the coexistence of national laws with the proposed international tax rules, it will also be necessary to ensure that the international tax reform is compatible with EU law. While the political agreement awaits implementation into legal rules, the EU plans to transpose some of its principles into hard law through the 2 directive proposals on 22 December 2021 to ensure a global minimum level of taxation for multinational groups and to prevent the misuse of shell entities for tax purpose (ATAD 3). Progress is being made in the EU to adapt these

rules to the fundamental freedoms of circulation, despite some resistance (for example, Hungary), while a political deadlock seems to continue in the US.

The multilateral treaties and model rules that remain to be finalized will have to go beyond all existing multilateral instruments. The interaction between bilateral and multilateral tax treaties is addressed in the Annex to the Declaration, entitled «Detailed Implementation Plan». For Pillar 1, it is specified that for countries that are already bound by a previous convention, the previous text will continue to apply as long as it does not concern the Amount A. The proposed multilateral convention for Pillar 1 will have to resolve inconsistencies with previous conventions that would not allow the application of the Amount A and establish the necessary link between the parties in the absence of pre-existing treaty relations. For Pillar 2, alternative rules in some tax treaties will be considered when determining the model rules, and the multilateral instrument should facilitate the implementation of the tax liability rule in the relevant bilateral tax treaties.

Finally, this reform has raised concerns among many international actors (governments, corporate groups, tax administrations, but also practitioners and academics), about the concrete implementation of the pillars and their interaction. The common approach to the GloBE rules and the order of priority of the Pillar 2 rules give rise to fears of an à la carte or selective application of the pillars by different countries. The interaction of the two pillars causes a concrete risk for companies of creating situations of double or even triple taxation, leading to an increase in disputes between jurisdictions (between market jurisdictions, between states of residence, between market states and states of residence, etc.). The coexistence of old and new principles finally makes the international tax system more complex, less readable, and will inevitably create new questions of application and interpretation.

A multilateral shift?

Since the 1920s, tax treaties have been designed primarily on a bilateral basis, for two main reasons. First, the primary objective of bilateral tax treaties is based on the source-residence logic, in order to eliminate double taxation between source and residence, usually by requiring the residence state to give up or to make its request conditional on that of the source state. Second, a bilateral contractual logic prevails, modelled on the bipolar geopolitical logic of the time. Far from this logic, the BEPS reform wishes a multilateral shift, since it proposes new

multilateral treaty models that will strengthen multilateral relations between states and tax administrations.

While multilateralism has positive aspects, as action is stronger when acting together, it requires compromises on certain well-established principles at the national level in order to reach a consensus. Significant differences between countries, including very significant differences in the level of economic development or national income identified in GDP or GNP, and in tax administrative capacities, as well as strong differences in economic structure, such as capital importing or capital exporting countries, makes consensus very difficult to achieve. There is a gap between the speed at which developments are taking place regarding the economy, technology, social issues, the pandemic, and the speed at which decisions are taken and implemented at the multilateral level.

Multilateral action may also be insufficient, especially in the field of new technologies. For example, the OECD has published a draft «Crypto Asset Reporting Framework» (2022), but it is limited to cryptocurrencies. While the taxation of a gain derived from a cryptocurrency transaction or other digital tokens - fungible or not- is important, it only relates to the final transaction. Yet, prior discussion of the design of the decentralized system as a whole and the underlying business model remains fundamental to designing appropriate regulation.

For its part, relations between tax administrations of most countries also tend to become more multilateral, thanks to common standards and resources such as the Common Reporting Standard (CRS) and the Common Transmission System (CTS). Transparency and information exchange are progressing, with the CbCR. National automatic information exchange systems such as Foreign Account Tax Compliance Act (FATCA) in the US are increasingly widespread, although this American innovation poses a number of practical problems for many countries. In addition, the OECD Forum for Tax Administration enables the tax administrations of different countries meet to discuss concrete situations, such as a group operating in several countries, in order to determine how to proceed. This makes it easier to resolve disputes, to facilitate amicable agreements in the absence of harmonized tax practices and also to gather informations on the entities and activities of nationals in other countries to strengthen the tax revenues of the states. It may also happen that in some cases tax administrations do not cooperate with other administrations or even with taxpayers.

The difficulty for developing countries remains the lack of financial and human resources to develop their administrative capacity, although some progress has already been made through initiatives such as the IMF Tax Administration Diagnostic Assessment Tool (TADAT). It is difficult for developing countries to keep highly trained, qualified and competent people in their country; many leave for countries where they will be better paid. To date, these countries are effectively excluded from practical information exchange and administrative cooperation in many cases.

Finally, there remains a lack of dialogue on international tax between ministries of economy and finance and development assistance agencies. In many developed countries, the ministry addresses the private sector and sometimes adopts an aggressive attitude in terms of negotiation practices with developing countries, which sometimes remain defenseless. The same is true for the environment, even though mechanisms already exist. For example, as part of the Obama administration's tax incentives in response to the 2008 recession, there were a number of tax expenditures to try to stimulate economic growth in new technologies, and there was a specific provision for the Treasury Department to consult with the Department of Energy in the Environmental Protection Agency and to give them specific roles in reviewing tax expenditure requests that would require technical expertise.

In view of this situation, only time will tell if this multilateral shift is successful.

2.

tax challenges for the future

Taking into account the various changes of multiple nature expected in the future - legal, political, social, demographic, scientific, climatic, technological or economic -, seven main tax challenges for the future have been identified: climate change, technological revolution, tax decision-making process, worsening inequalities, the implementation of the international tax reform, inadequacy of the legal rule and limitations of the dispute resolution system.

1. Climate change

One of the most important tax challenges to overcome will be climate change mitigation, which remains one of the 17 Sustainable Development Goals of the UN 2030 agenda[4]. The activities of companies and individuals can have a strong impact on waste production, climate change, air or noise pollution. Consequences of human activity on the climate has to be taken into account[5].

Note 4 See the ADI/ILA 2023 White Paper on SGDs Beyond 2030, https://www.ilaparis2023.org/en/white-paper/sdgs-beyond-2030/.

Note 5 See the ADI/ILA 2023 White Paper on Anthropocene, https://www.ilaparis2023.org/en/white-paper/anthropocene/.

National and international tax rules can play a role in addressing this challenge. However, countries have different approaches to climate change due to unequal legal recognition, and to role assigned to taxation as a tool to guide behavior.

The consequences of human activity

The latest assessment of the Intergovernmental Panel on Climate Change (IPCC) confirms that human activity is partly responsible for global warming[6]. In this respect, the massive slowdown in human activity during the Covid period has led to a decrease in air pollutant emissions. However, this decrease has been very small and reminds us of the alarming findings of the IPCC: a warming of 1.5°C around 2030, the rise in sea level, the weakening of the effectiveness of carbon sinks and the Atlantic Meridional Overturning Circulation (AMOC) ocean current, the increase in concentrations of methane with a more warming than CO2 or extreme weather events. It is now urgent that humans act on their lifestyle, consumption and production habits.

Note 6 Climate Change 2022 - Mitigation of Climate Change, Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, WMO, UNEP, April 2022, https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf.

The report notes differences in climate impact depending on the income category concerned[7]. For example, high-income households consume and demand more energy than is necessary for a decent standard of living. High-income people have higher energy footprints. Conversely, low-income countries can have a *per capita* carbon footprint 30 times smaller than rich countries, and emissions are primarily domestic and related to the provision of essential services. The carbon footprint per capita increases with income category: low, middle and high. The top 10% of emitters of which only 1/3 are from emerging countries contribute about 45% of global emissions, while the bottom 50% of emitters contribute 13% of global emissions[8]. Therefore, a difference in emissions is observable between disadvantaged/rich, developed/developing countries and the better-off countries need to make greater efforts to reverse this trajectory. A particular effort must be made by the most energy intensive sectors and people with high economic status.

Note 7 See, Chapter 5 "Demand, services and social aspects of mitigation», https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_Chapter05.pdf.

Note 8 Chancel and Piketty, 2015: http://piketty.pse.ens.fr/files/ChancelPiketty2015.pdf.

Unequal legal recognition

"Climate change" is polysemous. Sometimes it refers to climate or to the environment or to ecology. Many states protect the environment in their constitution. The impetus was given by the Stockholm Conference in 1972, which led to the constitutionalization of the environment in countries such as Sweden (1974), Portugal (1976) and Spain (1978). In the 1990s, other countries followed, such as Germany (1994), Finland and Mexico (1999). France integrated the Charter of the Environment into the preamble of its Constitution in 2005, and the Constitutional Council recognized that «the future and the very existence of humanity are inseparable from its natural environment (...), the environment is the common heritage of human beings (...), the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation» (Decision No. 2019-823 QPC January 31, 2020). Even more recently, Italy amended its constitution to add environmental protection in Article 9, which reads: «It protects the environment, biodiversity and ecosystems, also in the interest of future generations (...)». In these texts, the terms global warming, climate or ecology are often absent. In this regard, it is interesting to note that in the US where the environment is not explicitly protected by the Constitution, there are ongoing litigations to

try to establish a legal precedent that doctrine of public trusts applies to the atmosphere for climate purposes. The idea is that the state must act as a custodian of the atmosphere for all, so that everyone can exercise their rights.

The reference to climate change is actually found in international agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the United Nations Framework Convention on Climate Change (1992), the Kyoto Protocol (1997), the Paris Agreement (2015), and also in several reports of the OECD, the UN (IPCC) or the World Trade Organization (WTO). The same observation can be made in European law, which has set the course with the Green Pact for Europe (2019) aiming at carbon neutrality in 2050 and which must be implemented by the «Fit for 55» package (2021). There is no shortage of European rules, based on regulations (Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality), directives (Directives 2003/87/EC on greenhouse gas emission allowance trading; 2003/96/EC on the taxation of energy products and electricity; 2008/118/EC on the general arrangements for excise duties or 2009/28/EC on the promotion of the use of energy from renewable sources) or even guidelines (Guidelines on State aid for climate, environmental protection and energy for 2022). At the national level, and in many countries, short or long-term environmental programs have been established. To only take the French example, we can cite the climate plan, the France Relance plan, the national low carbon strategy or the climate action plan.

Taxation to guide behavior

The State has two ways to guide behavior. In a negative way, the State can correct the behavior of natural or legal persons or activities that harm the environment. This involves imposing a heavier tax burden on the person causing the environmental damage in order to punish them. This leads us to consider green taxes, based on the polluter-pays principle, which aim to correct negative externalities. The leaders in this field are the Northern countries, which have developed a Scandinavian model. In a positive way, the state can help natural or legal persons who have a favorable action to support or encourage the environment. The logic of behavioral or Pigouvian taxes is opposed to the core role of levying taxes to raise revenues.

The negative intervention of the state has a budgetary vocation - to increase tax revenues - as well as to penalize behaviors or

activities that have a negative effect on the environment. This type of intervention is therefore favorable to the state and unfavorable to the taxpayer. Conversely, positive government intervention will allow for the granting of tax favors in relation to a reference tax system. These advantages result in tax expenditures, and therefore in a shortfall for the state. This method of tax intervention is favorable to the taxpayer and unfavorable to the state. Some countries, such as the US, place more emphasis on tax expenditures. Taxation is one means of guiding behavior, but other instruments exist, such as regulation or the creation of quota markets, thanks to cap-and-trade measures.

The European ambition is important and has enables progress on subjects such as green taxes or the repeal of subsidies, which are an important part of the European agenda. The EU is a real leader, as the US in the 70's and 80's in terms of regulation. The EU has a real advantage over the US because control of environmental issues is consolidated at the EU level through directives that coordinate the activities of member states, whereas the U.S. federal system poses more difficulty in coordinating federal legislation with the independence of the states. There is a constant tension between what needs to be done at the federal level and state control. The lack of harmonization leads to risks of redundancy between what is put in place on the regulatory side and what happens on the tax expenditure side. Some regulations are effective when pollution is targeted - new technologies can help as well as pollute - and it is easier to regulate when there is single or identified sources. Finally, when economic policy objectives conflict with environmental protection, which is an objective of general interest, the tax measure is no longer economically efficient.

2. Technological revolution

The rapid development of new technologies calls for a rethinking of existing legal rules, as human intervention may eventually disappear in future transactions. Indeed, there is a risk that cash payments will be reduced or eliminated in the long term, forcing one to anticipate that all transactions could be regulated without cash, without physical exchange. The most important challenges in this area result from the transformation of humanity caused by the development of these new technologies, which evolve faster than the legal rule and from the fact that data is an intangible wealth.

The transformation of humanity

Technical progress allows the emergence of new technologies or industries. Several industrial revolutions have followed one another. We are living today in the 4th industrial revolutions described by Klaus Schwab in 2016, that of a connected world (https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3385454/Schwab-The_Fourth_Industrial_Revolution_Klaus_S.pdf) . Humanity is transforming under this effect. Our societal model is changing. Our way of working, of consuming, of communicating, of informing or expressing ourselves and more generally of living in society is being disrupted. The same is happening to societies that are being restructured around modified production, consumption or transportation systems. The state, public administrations and political institutions are reshaping their actions according to these new tools.

The digital economy has given rise to new hegemonic business models and disruptive players. It has transformed the role of capital and the size of companies. This technological transformation imposes on the law new concepts such as the cloud, robots, artificial intelligence, algorithm, internet of things, big data, digital presence, virtual permanent establishment, significant economic presence, blockchain, bitcoin, or intelligent assistants. Based on this observation, it is certain that the replacement of humans by machines will transform labor income and social contributions. The digitalization of the economy has already had an effect on the tax system.

Faster developments than the legal rule

The design of our systems is the result of a time when commerce was essentially physical. To think that our new interlocutors would be platforms or robots was then inconceivable. However, the speed of propagation of these new tools is such that legal rule is caught off guard. The extension of new technologies from web 1.0 to web 2.0 has caused an extension to new external actors. Cryptography allows us to exchange and transfer large amounts of data in a fraction of second, and cloud computing means that computing and storage capacity can be provided by a cloud, beyond a computer or server. The difficulty is that blockchain technology, which the law is beginning to grasp, will soon be overtaken by the advent of the quantum computer, which will replace classical electrical circuits with atoms, to increase computing power and break the cryptographic security keys securing the blockchain.

Data as intangible wealth

The data generated by these new tools is stored online and offers a wealth of information to anyone who has access to it. Data has two fundamental characteristics: it represents economic and strategic information, as a source of wealth for those who exploit it (companies, states or others), and it digitally identifies a legal or natural person. From this point of view, it's essential to determine the owner of this data, its location and its collection. From a policy perspective, we are witnessing the emergence of new, unregulated, competing digital powers that are having an effect on the market. The problem posed by this development is twofold: it creates new risks for the security of the data that will be used to establish the tax that will be collected, and these risks lead to doubts, a profound questioning of the bonds of trust and the legal rule, particularly with regard to the use that will be made of this data by those who hold it. There are therefore two needs: to protect the markets from these risks in order to protect the tax base, but also to protect the taxpayer from possible infringements of her/his fundamental rights.

This technological reality can already be observed with the decentralization of finance which allows traditional products and services to be provided without intermediaries and the emergence of new highly volatile digital assets such as crypto-currencies, leaving central banks perplexed. The use of data for tax purposes has not failed to reveal its usefulness: to detect fraudulent behavior in an automated way, to search and control information in real time and, most importantly, to increase tax revenues. Every year, it is possible to observe a tax gap resulting from the difference between what should be collected if the tax law had been respected and what was actually collected. In many countries, it can be seen that some gaps are not significant for taxes where information is easily verifiable, but where information is not, the gap widens considerably.

In practical terms, some countries have already implemented new tools such as blockchain in tax matters. For example, some countries already register companies with their assets on the blockchain without any human intervention. These new systems allow to generate secure electronic invoices to prevent falsification and to collect taxes (GAChain system in China). In other countries, blockchain is used to combine different third-party intermediaries in order to optimize information collection (experiments in Sweden and Finland) or to establish different modes of cooperation, either vertical - between taxpayers and tax administrations (Making Tax Digital program in the UK) - or horizontal - between tax administrations and other authorities (Brazil). International (BConnect system in Mercosur countries)

and European (European Blockchain Services infrastructure) cooperation systems are also using this new technology to facilitate the exchange of information. The possibility for the tax authorities to access information in real time through electronic declarations or invoicing systems places them in a third-party situation. The risk is that this situation will lead to systematized real-time controls: a metavers tax audit. The new technologies thus put to the test the rights of defense of the taxpayer who, in some countries such as India, has no real interlocutors. Some countries use datamining or machine learning systems based on artificial intelligence to support their tax audits, to identify fraud risks in an automated way, or to carry out research, investigation, programming, control and recovery operations for tax violations (France). In Brazil, the use of artificial intelligence and big data has allowed, even during the pandemic, to increase the Brazilian budget by 10%.

3. Tax decision-making process

The decision-making process of states is difficult to grasp in international tax matters. Indeed, taxation remains a sovereign power of the State that is discussed beyond the sphere of the nation-State, and the taxpayer must deal with a superposition of norms from different legal orders. In this context, the tax challenges of decision-making power are based on the need to address the democratic deficit and the alteration of the taxpayer's trust in order to reflect on tax governance.

The democratic deficit

Some voting procedures lead decisions to be blocked. This is the case in European law where the unanimity rule has the effect of paralyzing European tax action, while preserving the fiscal sovereignty of member states. The failure to adopt a European GAFAM tax or the impossibility of achieving a common consolidated tax base (CCCTB) for companies shows it. This rule is also an obstacle to the adoption of a European budget for the Union.

In U.S. law, super-majority or unanimity rules can be real obstacles to the adoption of environmental taxes. Thus, some instruments to mitigate climate change are easier to use than others. Moreover, depending on the legal characterization chosen (a tax, a fee or a trading option permitted system), adoption can be by majority or super-majority as shown in a decision of the 3rd district of the California Court of Appeal (California Chamber of Commerce v. State Air Resources Bd., 10 Cal.App.5th 604, April 6, 2017), and may have an impact on whether or not the parliamentary filibuster technique known as the "Filibuster rule" is applied. Finally, the United decision adopted by the US Supreme Court in 2010 (Supreme Court, Citizens United v. Federal Election Commission, January 21, 2010) leads to the influence of the wealthiest on the American election campaign, and indirectly on the rule of law. The justices held that the legal prohibition on corporations and unions using their own money to support or oppose candidates for elected office and public office violates the First Amendment of the U.S. Constitution concerning freedom of speech.

In some developing countries, the situation is different and ways are used to make people act against their duty or conscience. Corruption leads to problems of enforcement and consistency of the law, where enforcement leads to adjustments or where the practices of the administration lead to misapplication of the law. Some tax administrations that are not satisfied with the outcome will sometimes find a way to turn away from the outcome that it does not suit them. The institutions of some developing countries are weak at the same time as they produce institutional rules. Some particularly politically unstable areas, such as the Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) in Pakistan, may also receive tax exemptions to promote industrialization in these areas.

Alteration of trust of the taxpayer

There is sometimes a gap between what a country wants to do in terms of taxation and what it ends up doing. Thus, rulers may find that there is a difference between the will of the people and the democratic outcome of the political action that has been taken. The design of some political systems, such as the Checks and Balances system in the US, does not really allow the majority to get what the people want. Moreover, tax progressivity will not produce the same result depending on which political system is considered: for example, in the Swedish system based on a political compromise, or in the American system based on the Checks and Balances system. This diver-

gence leads citizens to distrust their political system and their political leaders, and trust in government is essential when it comes to taxes. This mistrust is further increased in an international context, where tax competition puts states in competition, when a country's legislation attracts taxpayers because of a more attractive tax rate (Ireland) or the existence of à la carte transparency measures, such as in Sweden.

In the US, the president can sign or not the tax bill that comes out of Congress. Indeed, because Congress Members represent many divergent territorial interests, a tax bill may satisfy no one. Lobbyists lobby, but so do entrepreneurs who are in favor of tax cuts. The final result may therefore disappoint citizens.

To accept taxes, the relationship of trust between the people and those who govern them must not be altered. This is the key to tax acceptance. The taxpayer must have confidence in the political process of tax decision, but also in his relationship with the tax administration. It is difficult to accept taxes in a society where there is too much fraud, evasion or corruption. The taxpayer is willing to pay if he thinks that all other taxpayers pay. If someone reduces his share of taxes, he will always think that he is paying too much compared to others. The taxpayer is always faced with a choice: to pay or not to pay, to report or not to report, to pay in cash or to reduce the amounts to be reported. If trust is established, the taxpayer is more likely to pay his fair share of taxes. Conversely, if there is doubt about the behavior of the tax administration or the state, then the social contract breaks down.

With new technologies, trust is more of a hope than an assurance. It is the underlying technologies that create trust by assuring people who do not know each other that they can trust each other to collaborate on the blockchain. The emergence of virtual currencies also revolutionizes the bond of trust that individuals have historically built with fiat currency. However, the disembodied administration - in the absence of a physical agent to represent it - that equates the individual with a computer stream, the use of automation in political decision-making or the setting of taxes based on the collection of data that the person does not control, are all elements that cause the taxpayer to lose trust.

Finally, taxpayer confidence may be impaired by the lack of stability in the tax rule, caused by the government's change in the objectives set. This instability of tax policy, or its inconsistency, increases the taxpayer's legal uncertainty. Some changes in tax policy are very costly for companies that invest heavily to achieve the set objective, then find themselves overnight with the opposite objective and a lost investment. This change can

also be observed in environmental tax policy and leads to a misunderstanding of the tax system by the taxpayer.

Tax governance

Today, we are witnessing a power shift that is leading to new models of global tax governance. Standard-setting organizations, such as the OECD, are developing principles that member countries may implement in their domestic legislation. Multilateral organizations are the most influential in international affairs in the 21st century, and groupings of states such as the G7 or the G20 have real influence. There is a shift towards non-state actors and also towards geographical areas seeking to act collectively to defend their regional interests in various forums, such as the ATAF or the Latin America and Caribbean regional program within the OECD.

The change also involves the process set up by these institutions or common economic interest groups, which will result in the promulgation of a minimum standard that is accepted and reviewed by peers and then discussed in the forums. A state that does not comply risks being placed on lists established by the OECD, the EU and some countries for its uncooperative behavior. A negative report on a country is the closest thing to a sanction.

Finally, this phenomenon questions the relevance of maintaining models that embody different economic interests reflecting in different treaty models (e. g. UN, OECD, ATAF, US...), while regional powers are being redrawn and the OECD model is in the majority. Moreover, the legitimacy of organizations such as the OECD, which negotiates in an "inclusive" framework comprising more states than it has members, can also be questioned.

4. Worsening inequalities

Some economists, such as Thomas Piketty, identify a historical movement toward equality over the long term, demonstrating that the world today is more egalitarian than in the past, moving towards greater equality of status, property, income, gender and race. However, reality shows that factors such as the Covid19 or population aging have accelerated the growth of inequality. This economic and social reality presents new tax challenges to address wealth and income inequalities and inequalities between countries.

Wealth and income inequalities

Wealth is increasingly unequal, and past attempts to address it have not worked. Wealth tax experiments phased out by several states, citizenship or residency investment programs have not been very successful either in combating international tax evasion or in addressing wealth and income inequality. Moreover, Covid19 has contributed to increased debt, spending and inequality.

The ability to pay principle reminds us that a state must distribute its burdens equitably, taking into account the economic capacity of citizens. Undermining this capacity can provoke a feeling of tax injustice among taxpayers, which can lead them to revolt, as in the case of the social movements of the yellow vests or the red caps in France, signs of tax exasperation. Taxes allow the state to exist and to finance general interest expenditure. In return, the state must be able to collect taxes to help the development of its country by redistributing this money to the people, in order to build roads, hospitals or schools. To ensure that if functions properly, institutions must guarantee that public money is used as intended.

Another inequality concerns the distribution between labour income and capital income. American economist Arnold Harberger based his early economic theories on the assumption of a closed economy[9]. After revisiting his research to take into account the open economy revolution, he did not hesitate to modify his theory to assert that it is now labor that will bear the cost of the corporate tax, because if a company is overtaxed in one country it can go elsewhere. In France, the balance between the taxation of labor and that of capital has taken different turns, from a rebalancing in favor of one or the other depending on the period. In addition, there are some inequalities in inheritance tax, as it appears that similar factual situations are not treated in the same way and this situation is aggravated by the fact that the tax authorities do not have the necessary information in this area.

Inequalities between countries

Developing countries have different needs than developed countries. One of the difficulties for developing countries is the need for intellectual property, capital or services. To do this, they use foreign companies and the cost of the withholding tax is passed on to the customer in the developing country. This

Note 9 «The Incidence of the Corporation Income Tax Revisited», National Tax Journal, vol. 61(2), pages 303-312, June 2008.

situation is an impediment to economic development. The introduction of an article 12 B in the UN Model that gives companies the choice of paying tax on the basis of gross income, in the form of a withholding tax rate agreed by the parties to the treaty, or net income, according to an apportionment formula, and the implementation of the authorized OECD approach show that this issue is not simple and that the solution is difficult to find.

In addition, international tax reform has been carried out by the OECD in a so-called "inclusive" framework that brings together 140 countries «on an equal footing», whereas in ordinary times the OECD is composed of 38 member states. Some countries, such as Brazil, have an interesting situation in this regard, as they have not signed the MLI, but nevertheless negotiate within the inclusive framework by dealing bilaterally. However, the Brazilian Minister of the Economy has argued in last months for Brazil's rapid integration into the OECD, whose membership process has already begun. While progress has been made, allowing many developing countries to join the negotiations, a common sentiment prevails that it will always be the 10 most powerful countries that matter most, even considering that some developing countries are technically strong. In 2018, a study observed that while the MLI theoretically offers great flexibility to signatories, some major treaties remain outside the scope of the instrument. Within the treaties that do not match, a large number of agreements are not listed by developed countries, indicating that the scope of this instrument is not as broad as intended[10]. While many voices may be heard, they risk being diluted in steering committees or other groupings that will transform what is said, while not all states will be there. There is a lack of legitimacy in the structures. For its part, the UN can present a dysfunctional framework in which political blocking positions can be expressed, as in the case of the Code of conduct on tax aid launched about ten years ago and paralyzed by some countries that do not want to grant aid that would be subject to taxation. In some cases, the existence and persistence of inequality keeps developing countries in a bind. On the one hand, they cannot comply with investment treaties because of these inequalities, and on the other hand, their reform would lead to the violation of these same treaties. Other countries, such as Brazil, where the distribution of wealth is one of the worst in the world, have difficulty changing this reality through taxation because the poverty rate is very high.

Note 10 Suranjali Tandon, The Multilateral Legal Instrument: A developing country perspective, NIPFP Working paper series, n°220, 2018: https://nipfp.org.in/media/medialibrary/2018/03/WP_2018_220.pdf.

One of the difficulties also lies in the balance between return, capital and inflation.

Finally, demographic change and population aging already begun to affect some countries, such as Japan, which has the world's oldest population according to the IMF (https://www.imf.org/-/media/Files/Publications/CR/2020/English/1JPNEA2020001.ashx). The aging of the population is expected to increase income inequality because, depending on the structure of the population, fewer and fewer working people will work to support more and more elderly people. This will be a challenge for the future, as incomes will decline due to the declining population and the rapidly increasing share of the older people. Social security systems and income distribution will be affected by this demographic reality.

5. Implementation of the reform

Pending the implementation of Pillar 1 and Pillar 2, there are many tax challenges, so great is the uncertainty about the success of this reform.

Pending Pillar 1

Originally, discussions focused on the importance of data, its connection to states and the need to capture the value created by digital companies. Pillar 1 will not be enough to address these issues, as it was then extended under pressure from the US to the entire economy contrary to the UK's desire to focus on the digital economy.

The objective of this pillar is to tax where the sale takes place, i.e. where the immobile consumer is located. Taxing profits where the market is located facilitates collection, makes it more difficult to shift profits and eliminates tax competition. In the end, the approach is more economic than legal, reminiscent of the problem in the 1920s in the US when the apportionment method was rejected as too complex in favor of the arm's length principle, which is still applicable despite the current reform.

However, several doubts have been expressed about the realization of this pillar. For some, even if properly implemented, the efforts made to achieve this reform will not result in a significant amount of tax revenue for the States. Some developing countries do not see the point of implementing Pillar 1 rules when every payment made by a non-resident is subject to withholding tax, and when such a system has been working well for a long time and is consistent with international rules. In addition, some countries have implemented digital taxes that bring in more money than the cost of implementing the reform. Thus, some developing countries are concerned that efforts to achieve this reform will not result in a significant or sufficient amount of tax revenue.

If the reform becomes a reality, the progress will be significant, because it implies moving away from the separate entity theory and separate accounting to consider the group as a whole. The symbolism is strong and involves a move away from the physical link and, to a lesser extent, the arm's length principle. Taking the market into account for tax allocation is innovative, because it implies taxing on the basis of a sale. If this is the case, developing countries hope to be able to implement Pillar 1 in a simple and inexpensive way. While some states have agreed to withdraw their digital tax if Pillar 1 is implemented, not all have done so, and it is likely that these measures will be cumulative with these unilateral measures. If the reform fails, there will be a risk of accumulation of multiple rules as diverted profit tax, the equalization levy in India and the Digital services tax (DST) in Europe or multiple DSTs in some federal states like Brazil. In this case, all these rules should probably be standardized and an appropriate tax credit system should be provided.

Pending Pillar 2

The economic rules of the Pillar 2 operate like a cartel in a private market, which is inherently unstable. This is because there is always an incentive, at least in the short run, for one of the participants to secretly or publicly reduce its prices, in which case it gets a larger share of the market to the detriment of its competitors. It is therefore important to determine how to set it up in such a way as not to encourage firms to undercut each other's prices. The legal rules imply that everyone agrees to play by the rules in order for the system to work and for the revenue to effectively be taxed somewhere. We need to avoid the situation where states agree that income should not be taxed, and that is certainly why the UTPR was developed. In any case, Pillar 2, which will affect more companies than Pillar 1, is

theoretically easier to implement because it is less innovative than Pillar 1.

If the reform becomes a reality, there will be a risk to a double levelling because tax havens will increase to 15%, and those beyond will decrease to 15%. This minimum standard of 15% will put the emphasis on the base, and therefore on aids and incentives. Indeed, a recent article show that "Pillar 2 increases the incentives for (at least some) countries to reduce the Corporation Tax liabilities they impose on companies, thus increasing the probability that countries reduce Corporation Tax liabilities perhaps even all the way to zero"[11].

In fact, the structure of Pillar 2 suffers from of number of weaknesses as shown by the application to business and developing countries. For developing countries, the reform will introduce complex rules (UTPR, IIR) whereas the rules already in place are simple and work well (withholding tax system, arm's length principle and Controlled Foreign Corporation (CFC) rules). Moreover, one may question the usefulness of the STTR rule. What is the point of setting a withholding tax rate of 9% when many countries already have a higher rate? And what will be the general compatibility with bilateral tax treaties? For their part, companies will find it difficult to cope with the new principles. For example, the definition of a tax base in a large group with different activities and different accounting systems will be complex and will require a very precise transaction-by-transaction analysis of the group's structures. The human and financial adjustment cost for the company will be high and some groups may prefer to pay penalties for non-compliance that are more cost-effective than the cost of compliance with the reform. The implementation of DAC 6 shows the paradox of a compliance obligation in a very short period of time, and then having penalties that vary from country to country (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L0822&from=FR). Moreover, one must be careful about the loopholes created by the divergences in implementation and enforcement between States, which could lead to the existence of a hybrid situation from which companies could take advantage, in the absence of common harmonized rules. In this respect, the implementation of ATAD 2 directive reflects the difficulty of States to deal with hybrid arrangements and to apply existing rules. As far as the US company is concerned, the problem is that the international agreement is about the possibility of introducing Pillar 2, not the obligation to do so. As a result, the US can remain outside

Note 11 Devereux, Vella and Wardell-Burrus, "Pillar 2: Rule order, Incentives, and Tax Competition", Oxford University Centre for Business Taxation Policy Brief 2022.

the agreement while many rules have been influenced by the US position. There is therefore a risk that US companies will be subject to both GILTI and UTPR if US domestic law is not changed. If reform fails, it will probably be necessary to go further down the road of taxing where the immobile consumer is, and where that is not possible to increase the VAT.

6. The inadequacy of the legal rule

The inadequacy of the legal rule leads to two tax challenges: the inexistence or inadequacy of concepts and the complexity of tax standard.

Inexistence or inadequacy of concepts

The emergence of new technologies has challenged national tax systems, which sometimes lack an appropriate concept to establish a legal qualification. One example is the creation of the concept of "digital asset" in France, which did not exist several years ago. The use of new technological frameworks, such as blockchain, or new technological products, such as cryptocurrency or NFT's, enriches the categories accepted by a given legal system. This enrichment must also allow for the updating of concepts that are now outdated, such as that of permanent establishment. Article 5§1 of the OECD model convention allows for many things, and the interpretation of this concept by some non-OECD countries without taking into account the associated commentaries, as is the case in Saudi Arabia or Sudan, poses difficulties. In addition, some legal rules need to be clarified, such as the adjustment of border taxes under WTO law. The same applies to the concept of source, without it being clear which source is meant, the place of production, the place where value is added or the place of consumption. The same observation can be made about the distinction between the concepts of avoidance and evasion, which is currently blurred in several countries and needs to be better defined in a common way, especially since this distinction is linked to other concepts of tax residence (easier to shift) and citizenship (more difficult to change).

The changing context in which the legal rule was developed must allow for its evolution. The main treaty models of the OECD and the UN were adopted in a different time from the present. The UN model was born out of the need to find common ground between developed and developing countries, whereas today developing countries are directly involved in discussions of international tax reform through the inclusive framework. The UN has also shown that it can act directly to change its model

and introduce a new article on digital services, such as the article 12 B. However, residence state taxation remains the primary rule, and source state taxation the secondary rule. This rule is commonly accepted and the BEPS reform continues to propose this priority in Pillar 2. Developing countries are less favored by this structure.

Finally, some concepts have been enacted to make the reform work, without being founding principles of international taxation. Such is the case of value creation, which is an empty shell. It's more a political concept than an economic one. The proper definition of value creation is bound to challenge future reforms of the international tax system. One author demonstrates that "the recent developments of Pillar 1 (Amount A) have thoroughly neglected addressing the question of value creation (and not only for the digital economy)" and proposes the integration of a coherent concept of value creation for Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE), to facilitate the alignment of value creation and profit distribution, particularly in terms of transfer pricing[12].

Note 12 Oliver Treidler, "On Defining the Concept of Value Generation for Transfer Pricing in the 21st Century", SSRN 2022.

Complexity of the tax standard

International tax rules are becoming more and more complex due to an overlap of norms, aggravated by the incremental international tax reform. Today, in order to analyze a bilateral tax treaty, one must have: the treaty, the MLI, the most-favored-nation clauses, the legislation of both States, the texts and the European case law, while waiting for the entry into force of the different multilateral instruments that will be used tomorrow to implement the international tax reform. Some African countries, such as Mali, will have to apply this superposition of standards to the simplicity of their laws. To avoid unnecessarily complicating simple domestic rules, Brazil preferred to keep its domestic rules on CFC, transfer pricing and withholding taxes, as this would also involve constitutional changes. This overlap is accompanied by a proliferation of anti-abuse rules around the world, with no commentary, no case law, no common cases or even common standards of interpretation to understand how these different rules work and how they fit together. In the context of the application of the principal purpose test, a number of terms are not defined or have different meanings in different countries. The European example alone shows the difficulty of administering 27 different tax systems for companies in the absence of common rules.

On the other hand, the taxpayer experiences the same complexity in simultaneous tax audits in different countries, where he is confronted with different tax administrations without knowing which tax administration's rules he should follow: the one carrying out the audit or another one, or all of them at the same time. This situation creates legal uncertainty for the taxpayer. The same applies to VAT, where the reaction of a tax administration may lead to multiple taxation without it being possible at present to eliminate it, as it is an area not covered by tax treaties.

Finally, the drafting of the tax rule also has an impact on tax justice and equality. It is noted that treaties are drafted by people from common law systems, which leads to difficulties in interpreting them if they are unclear. When the law is rewritten, it is sometimes to make a text that was originally simple denser and more cumbersome. This is the example in European law of the rewriting of the Sixth VAT Directive, which went from 38 articles (Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment) to 414 articles in the amended version (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax).

7. Limitation of the dispute resolution system

The limitation of the dispute resolution system is a challenge that questions the role of courts, especially since the implementation of the reform will inevitably lead to an increase in tax disputes and to the manifestation of the limits of arbitration in tax matters.

The role of courts

Some of the rules resulting from the reform do not give courts an immediate possibility to interpret the rule. Some disputes will arise at a later date and will allow for the interpretation or coordination of the rules of the Pillar 2, for example relating to the allocation of a research tax credit. For now, the legal framework of the reform is not yet in place. Questions may arise in the future, such as whether a civil law judge can use a decision rendered by a common law judge on the Pillar I. The only observation that can be made for the moment is that the judge has difficulty dealing with a rule of an economic nature. In matters of transfer pricing, the logic is more economic than legal. This situation no doubt explains why there is little litigation

in this area at the level of the supreme courts, because there is little room for the application of a legal rule, except for questions of procedure. Moreover, in order to judge certain situations, tax matters require the judge's knowledge of subjects other than law, such as economics, accounting or finance.

In addition, one can find some bad practices consisting in circumventing a court decision by means of a retroactive law, acting against the legal and tax certainty of the taxpayer. An Indian example shows this uncertainty. The Indian state lost a tax dispute against Vodafone in the Supreme Court in 2012 (Supreme Court of India, Vodafone International Holdings *vs* Union of India & Anr, 20 January, 2012). In response to this defeat, the state passed a law to retroactively tax the company's disputed transactions. The British company Vodafone then argued that this retroactive change in the law was not fair and equitable, based on Article 9 of the investment treaty signed between India and the Netherlands in 1995. The Permanent Court of Arbitration in The Hague ruled in favor of Vodafone (PCA Case No. 2016-35: Vodafone International Holdings BV (The Netherlands) v. India Award, 25/09/2020). These practices were sanctioned by the Court. In 2022, the Indian government announced that it would refund the amount in dispute to Vodafone. This situation could potentially change the cautious position of other courts, such as the ECHR in the Vegotex case referred to the Grand Chamber in 2021, which allowed new legislation to be applied retroactively to prevent a tax credit attributable to the taxpayer from becoming time-barred (https://hudoc.echr.coe.int/eng/ - {«itemid»:[«001-206214»]}).

Towards an increase in tax disputes

The multiplication of norms, their interweaving or their complexity make their application and interpretation difficult, which will inevitably generate numerous multi-jurisdictional conflicts. The design of Pillar 1 will necessarily lead to having to go beyond the place of conflict and create a risk of multiple litigation. The conflict will no longer be between the taxpayer and the tax administration, but between states on the tax allocation between several jurisdictions. No jurisdiction is foreseen for this purpose. Although the WTO's DSB can deal with this type of dispute and remains highly competent in tax matters, it is not really effective. Mutual agreement procedure is no longer sufficient and the current time limits for handling disputes are too long. This can be seen in the area of transfer pricing, where delays are getting longer and where the opening of several procedures (e.g. one per country) can completely paralyze the dispute.

Limits of arbitration in tax matters

In practice, while the mutual agreement for international tax disputes works very well and allows the dispute to be settled without making the decision public, taxpayers also resort to Bilateral Investment Treaty (BIT) arbitration whenever there is no tax carve-out. Tax arbitration is the continuation of the MAP before a panel of partly independent experts - some of which are in fact nominated by tax authorities - without an effective involvement of the person and with the right for this person to question the outcome of the arbitral award. However, some European limits have appeared since the 2018 ECJ Achmea case affirmed that the investor-state arbitration clause in a bilateral investment treaty between two EU Member States was not compatible with EU law (https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=823663). Since then, most EU Member States are committed to implement the Agreement for the Termination of Intra-European BIT (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22020A0529(01)&from=FR) and the ECJ continues to gradually dismantle of intra-EU investment arbitration, as the Achmea reasoning was extended to *ad hoc* arbitration agreements identical to arbitration clauses in intra-EU BITs (https://curia.europa.eu/juris/document/document.jsf?text=&docid=248141&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26091670).

Arbitration remains an interesting system in tax matters, because it is more flexible, as it's also possible to choose arbitrators according to the nature of the dispute (transfer pricing, withholding tax or other). Some countries, such as Brazil, have been trying to introduce this mechanism for several years, but without success. In fact, arbitration poses a difficulty for developing countries, which do not have the possibility to choose arbitrators, and almost all arbitrators are from developed countries. The lack of human resources, experience and training prevent such recruitment. In this context, the interests of developing countries are less well protected. In some developing countries, the constitution does not allow for the enforcement of a binding decision made outside the country. This distance was taken to avoid a return to the colonial history of some countries where the highest court was a private council located outside the country (e.g. Nigeria with the UK).

Many developing countries are aware of the tax impact of investment treaties and are developing practices to exclude taxation from their scope, for example by including a safeguard

clause. It is difficult for developing countries to comply with investment treaties because of economic difficulties related to inequality, labor right, poverty, institutional instability or democratic deficit. The tax implications of investment agreements are often not well understood by some developing countries at the time of their conclusion. This makes it difficult to undertake economic reforms without running up against these treaties, with the risk of different tax regimes emerging between the time the treaty was concluded and when it is implemented.

3.

tax policies issues for the future

Given the state of the art and the tax challenges previously identified, several questions need to be considered in order to build the tax policies of the future: How to mitigate climate change? How to support technological change? How to rethink the tax decision-making process? How to fight inequalities? How to rethink corporate taxation? How to improve the legal rule? How to improve the dispute resolution mechanism?

1. How to mitigate climate change?

It is necessary to educate citizens about climate change in order to change the behavior of households, businesses and institutions, and to encourage governments to take sufficient measures to respond to the urgency described by the IPCC report. States must become aware of the climate emergency in order to orient their public policies towards the preservation of the environment and natural resources as soon as possible, and must also focus on non-point source pollution[13]. If new perspectives such as the legal characterization of common goods or the adoption of a universal tax regime for outer space exploration can be considered, some measures can be taken to improve the existing tax system.

Legal characterization of common goods

How best to manage natural resources shared by many people? Elinor Ostrom published a book on the Commons in 1990[14], answering this question from the perspective of how property rights affect resource allocation. To avoid the "tragedy of the commons" which symbolizes the environmental degradation to be expected when many individuals use a scarce resource in common, Ostrom developed a theory of the commons based on three characteristics: the existence of a resource, rights to distribute its uses and collective governance to ensure the sustainability of the resource. This method allows for the best management of scarce and alterable resources. Indeed, the idea is to consider that there are goods or resources with which a common interest is associated, socially, collectively and legally recognized. To protect this common interest which can be

Note 13 There are sources of pollution with no single point of origin, for instance the transport of pollutants out of the ground by stormwater runoff.

Note 14 Governing the Commons - The evolution of institutions for Collective Action, Cambridge University Press, 1990.

national, international or local, the community designated as the social organization or government of the resource will manage the various rights, access or other aspects of the commons, in order to ensure the sustainability of the resource.

In this perspective, why not consider water, space or climate as common goods and imagine a way to tax them in order to preserve the existence of these resources and fight against their lucrative exploitation? Such a legal qualification would better protect common resources and more particularly to escape the blocking rules of super-majority required for some states in the US in order to introduce a change in environmental taxation.

A Universal Tax Regime for Outer Space Exploration

Activities in outer-space are multiplying in recent years and some space tourism companies are already making profits by offering space travel, such as the company Space Adventures which is currently working on the deployment of the first commercial space airports. Other private companies such as SpaceX or Blue Origin are working on the installation of extra-terrestrial habitats. To avoid a tragedy of the commons and build the trust necessary for governance, some researchers propose adopting a universal tax regime for outer-space exploration[15]. Taxation appears to be a key to considering the proper distribution of space profits.

These authors propose the creation of a universal tax regime for universal participation in the cost and profits of space exploration, in which countries would be charged a percentage of their GDP as a cost for potentially benefiting from the outer space. To implement such a universal tax system, countries must surrender their tax sovereignty to a supranational authority (a UN-led international tax agency) and must comply with the decisions and standards set by the supranational authority to be taxed according to their ability to pay, i.e. their GDP, for the benefits they can derive from space. A viable option will be a flat rate on countries' GDP. Therefore, countries become taxpayers.

Beyond this proposal, other kind of taxes can be considered such as the taxation of profits made in space by companies, or the taxation of space debris, satellite orbiting or space tourism. These perspectives could also contribute to preserve space resources and avoid their overexploitation.

Note 15 Proposed by Alexander Ezenagu and Eytan Tepper, Adopting a Universal Tax Regime for Outer Space Exploration, Proposal selected by the jury of the ADI/ILA 2023 Ideas Lab.

Improving the existing tax system

Different tax policies could be proposed to improve the existing tax system by changing some constitutional rules, improving some tax rules and promoting climate governance.

First, some legal changes can be made to introduce environmental protection into the Constitution where this is not yet the case, or to introduce anti-depletion measures, such as a rule that no more can be used than the resource can produce. A bolder idea would be to have a thematic constitution, here dedicated to the environment.

Second, some tax rules can be improved in three directions. First of all, to better evaluate and control the behavior, different solutions have been proposed such as the introduction of an annual assessment of the carbon footprint of companies, individuals or States or the reinforcement of reporting and evaluation rules to evaluate the real performance of green investments and the international control of tax expenditures. The same goes for improving the allocation of revenues with the implementation of a tax on financial transactions (e.g. the Tobin Tax) that would be allocated to the fight against global warming or a system of direct allocation of taxes to finance environmental projects. Then, to better guide behavior, it will be possible to set up general and specific rules. Regarding the implementation of general mechanisms, we can mention a border adjustment (e.g. European Carbon Border Adjustment Mechanism (CBAM) compatible with WTO law, whose idea is to standardize the rules between European and non-European producers in terms of greenhouse gas emissions), a carbon tax, a climate wealth tax or an individual carbon card. It also seems necessary to develop some negative instruments to correct harmful behaviors (e. g. eliminating fossil fuels subsidies with trade-in subsidies for polluting vehicles allowing the purchase of a green vehicle or exemptions or aids for the purchase of forests). Second, some more specific measures were proposed. Thus, the creation of taxes on natural elements, such as water. For companies, the implementation of a bonus-malus system based on their environmental behavior from criteria to be defined, such as the choice of long circuits, the use of pesticides or renewable energies, waste recycling or the level of their carbon footprint, could be considered. In addition, the design of an environmental tax credit based on the model of the research and development tax credit may allow some expenses to generate an environmental tax credit. Third, some authors have proposed to link the problem of climate change with two others – extreme poverty and international inequality – in order to reform the international financial system by redistributing part of the pro-

fits transferred by multinationals to developing countries[16]. Lastly, in order to better remedy environmental damage, it could be interesting to revise the starting point of the limitation period from to time of damage to the time when pollution ends.

Finally, climate governance can promote negotiations and discussions with groups of national and local governments, international and non-governmental organizations, private sector companies and other social actors (academics, economists, sociologists, philosophers...). Another idea would be to foster climate action by creating new tools in a sectoral or global way and by strengthening citizen participation in climate action and knowledge with climate watch groups, citizen consultations or the development of education in schools. Collective action could also be limited to a small group of people in order to foster the confidence of its participants.

Note 16 Alexander Faden, "Case Study Analysis of the OECD Pillar One and Pillar Two Allocations to Developing Countries", Bulletin for International Taxation, 08/2021, pp. 382-400.

2. How to support technological change?

Faced with processes where all human intervention can disappear, it seems fundamental to keep the final validation and interpretation by a human being. Human beings must remain in control of the machine in order to deal with all types of failures and tax officials need specific computer training to deal with them. While some very specific measures have been proposed as to provide a multilateral instrument to frame the technological evolution as a whole, beyond just crypto-assets or the creation of a tax on transactions taking place on the blockchain, tax policies of the future should focus on distinguishing the nature of data, establishing a data dividend and strengthening taxpayers' rights.

Distinguishing the nature of data

One of the interesting issues for the future is likely to be the nature of the data. Some of the technological processes that initially allowed for automated data processing to target fraud are evolving into mechanisms for collecting data published online on platforms by tax and customs administrations. It is

therefore a change of model with a reversal of the working methods of the administrations and of the processing implemented, since we are moving from targeted data processing when there is a doubt or a suspicion of offences against a person, to a general prior collection of data in order to target subsequent control actions. The development of data collection and analysis tools enabling the development and use of identification criteria or relevant indicators in order to identify tax or customs violations or infringements leads to the identification of two types of data: personal data and activity data. Moreover, different types of data appear, targeting an activity or the person, which are given different qualifiers: identification, context, taxation or characterization. The question of adapting a tax framework according to each type of data, since not all these data have the same value, will certainly arise in the future.

Establishing a data dividend

This idea is the proposal of a working group formed after California Governor Gavin Newsom called for the creation of a data dividend, in a 2019 speech, to share the wealth that comes from mining personal data with the users who generate it[17]. The idea is to share the wealth from the exploitation of personal data with the users who generate it by considering that data is a collective good and that any data dividend must take this fact into account. The primary logic of the data dividend is that the economic value of data comes primarily from the aggregation of data generated by large groups, rather than from a single individual. The working group evaluated different models for revenue collection, a mechanism that returns revenue to users for their digital work and which is the first component of a data dividend: sales-apportioned data dependency tax, sales tax on data, per unit tax (pay per data unit) or use tax (pay per data use), taxation requiring technical advances or a flat tax based on data intensity. According to the group, a sales-apportioned data dependency tax would be most effective with the creation of an independent regulatory authority where one does not exist.

Note 17 Feygin, Hecht, Prewitt, Li, Vincent, Lala, Scarcella, A Data Dividend that Works: Steps Toward Building an Equitable Data Economy, Berggruen Institute, 2021: https://www.berggruen.org/themencode-pdf-viewer-sc/?tnc_pvfw=ZmlsZT1odHRwczovL3d3dy5iZXJnZ3J1ZW4ub3JnL3d-wLWNvbnRlbnQvdXBsb2Fkcy8yMDIxLzA1L0RhdGEtRGl2aWRlbmRfZmluYWwucGRmJnNldHRpb-mdzPTExMTExMTExMTExMTExMTExJmxhbmc9ZW4tVVM=#page=&zoom=auto&pagemode=.

Strengthening taxpayers' rights

Taxpayers' rights were not born out of the digitization of the economy and will have to adapt to the future of this new environment, even more than today. One of the consequences of the application of this new technology to tax collection is the absence of an appropriate legal and regulatory framework. Data collection has entered a new era and challenges privacy, the rights of the defense, the inviolability of the home, and the principle of legal certainty. Maintaining information security and strengthening data confidentiality are therefore essential conditions for the use of this new technology by tax authorities in localizing the wealth and determining the owner or beneficial owner.

The risks to the taxpayer may be multiple[18]. As far as access to data is concerned, it will be necessary to provide secure access to data for taxpayers and tax authorities or other authorized competent authorities in order to allow corrections. As for the use of the data, specific training will have to be offered to the tax administration and any other authorized tax authority but also in the company, at the university, in other public or private institutions. With respect to data integrity, it is fundamental to ensure that data is properly stored and transmitted and to strengthen the integrity of interoperability by ensuring that it is stored in an appropriate location (server, cloud, etc.). Finally, it will be necessary to develop data security policies at all stages of access, activity, or transmission. All of these advances will allow the taxpayer to deal with technological error on data, the breach of the integrity of his/her digital tax identity, but also the use of these data in a manner contrary to the law. Finally, it will be necessary to avoid metaverse tax audits and to recreate human dialogue when it has completely disappeared.

3. How to rethink the tax decision-making process?

Once the democratic deficit is addressed, it will be necessary to rethink sovereignty and define good tax governance.

Note 18 For a deeper analysis see the work done by the ILA Committee, phase 1: J. Kokott and P. Pistone (eds), Taxpayers in International Law, Hart Publishing, 2022.

Addressing the democratic deficit

First, it is necessary to restore trust to encourage taxpayer consent. Taxpayers need to be reassured by greater transparency in the allocation of revenues. They need to be able to assess the outcome of implemented tax policies by identifying the performance indicators of these policies to verify that what was considered *ex ante* to be the likely effect of the new policy is confirmed *ex post*. It should be possible to determine the gap between what was expected and what was achieved, so that it can be adjusted to achieve the objectives initially set. The objectives of the evolution of the tax system must be posted and everyone must ensure that the state achieves them. This approach would help restore taxpayer confidence. The public authorities must also reassure the taxpayer about access and use of their data. These measures would allow taxpayers to be involved in the decision-making process.

Second, elections must be given meaning and value. In developing countries, institutional structures must be improved to reduce corruption and the informal sector. In the US, the influence of lobbies on the development of the rule of law must be controlled and the Supreme Court's Citizens United decision reversed, to prevent the influence of the wealthiest on election campaigns.

Finally, it is necessary to ensure the legitimacy and proper functioning of institutions and the rule of law. From an international perspective, it seems important to strengthen the legitimacy of the OECD's inclusive framework. From a European point of view, it's necessary to give the political means to act in order to abandon the unanimity rule, even if it requires the modification of the European treaties. The idea of creating a European tax, collected by a European tax authority and paid in an agreed manner to each member, with the establishment of a European taxpayer status, has also been proposed. From a national point of view, some technical and legal obstacles to the advancement of green tax rules need to be reviewed, as is the case in the US with the super-majority and unanimity rules, and the Filibuster procedure.

Rethinking sovereignty

The concept of "sovereignty in solidarity" was proposed by Mireille Delmas Marty, while she was at the Collège de France in the framework of the Chair «Comparative Legal Studies and Internationalization of Law". The idea goes beyond the absence of a world state and the interdependence that unites all global actors. No state can stand alone and must show solidarity. The

transposition of this idea to taxation makes it possible to imagine a solidarity-based fiscal sovereignty in order to implement an internationalized national tax law or a contextualized international tax law.

The first step would then be to define truly common tax objectives, in order to imagine the resulting responsibilities of all actors (states, international organizations, transnational corporations). The second step would be to define tax regimes for common international objectives, with mandatory national implementation.

Defining good tax governance

This concept first referred to a good governance standard introduced by the EU ECOFIN Council in 2008, to tackle tax fraud and evasion. It included transparency, exchange of information and fair tax competition. This concept then evolved and expanded to the four minimum standards of the BEPS project[19]. The issue has become so important that a chair has been created within the EU[20]. Pending this research, some measures can be proposed. On the one hand, measures to encourage states to adopt the principles of good governance, such as financial incentives or the provision of technical assistance to help countries meet their commitments in this area. On the other hand, simplification measures such as the development of unified approaches with third countries. Finally, real sanction measures linked to the list of non-cooperative countries by imposing surcharges on all those who refuse to cooperate.

If the BEPS reform has influenced the EU standard of good tax governance, we can find similar proposals in the international arena. In terms of information exchange, it has been proposed to develop different types of exchange and cooperation. In order to increase compliance, information on taxpayer and tax returns could be made public for use by other interested authorities. It has also been proposed to extend automatic information exchange to provide mechanisms such as FATCA to businesses, extending it to information on property, intellectual property, services, interests or other. Finally, the reporting of

Note 19 Irma Mosquera Valderrama, "The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries", Intertax, Vol. 47, Issue 5, 2019.

Note 20 Jean Monnet EUTAXGOV Chair, «Standard of Tax Good Governance", directed by Pr Irma Mosquera Valderrama.

financial transactions by third parties who have data could be strengthened and consideration should be given to finding ways to sanction non-cooperation other than negative reports on a State.

Finally, this good tax governance can be found within the tax administration. One proposal could be to create a pool of independent international tax inspectors, who are not linked to the representation of the different countries, but who remain technically competent to intervene independently on cross-border problems. Another more traditional proposal is to establish a dialogue between ministries and development aid agencies and to provide external expertise (technical, green or other) to tax authorities. Lastly, to retain trainees, countries may impose an obligation to serve their country for a given period of time or offer in-kind benefits that offset for the standard of living in the developing country.

4. How to fight inequalities?

There are different ways to fight against inequalities by rebalancing in favor of equality and solidarity, by going further in progressivity of the tax system or by strengthening the control of expenditures and revenues.

Rebalancing in favor of equality and solidarity

Rebalances can occur between incomes or instruments and also between countries. Among incomes, some rebalancing may occur between labor and capital incomes, for example to determine whether a dividend should be taxes low when it remunerates for labor that is taxed higher. There should be criteria for deciding the distribution between workers, owners, capital owners and consumers. Some economists, such as Thomas Piketty, propose to give 50% of voting rights in the company to employees and of the remaining 50% to the shareholders, it being understood that no individual shareholder can have more than 10% of the voting rights for large companies. This would allow a rebalancing between labor and capital. Finally, there is also scope for better control over the mix of policy instruments for climate change, between taxation, regulation or cape-and-trade measures.

Between countries, each country must have sufficient human and financial resources. Participation by developing countries in BEPS reform must be easy and inexpensive, and implementation must ensure that developing countries get a return on their investment, i.e. that the cost of the effort to participate does not outweigh the potential benefits. The current proposal for a unified approach is unlikely to meet the needs of develo-

ping countries. One solution might be a world tax of 15% administrated by the UN on the basis of a consolidated profit, with no knowledge of where the profit is made. Other general proposals have been made by Thomas Piketty to rebalance in favor of equality, for example by creating a global tax of 2% on fortunes over 10 million euros to finance health, education and infrastructure in the poorest countries. Finally, wage adjustments can be proposed in the demographic field, as it has been shown that they tend to decrease these inequalities (https://link.springer.com/content/pdf/10.1007/s10888-019-09411-z.pdf). In fact, fiscal policies should reconnect tax systems to population aging, in order to find new financing resources for a global adaptation of society to this reality, through the health insurance systems, when they exist. When this is not the case, solutions such as increasing inheritance and gift taxes, introducing a social levy specifically dedicated to the elderly or introducing solidarity days for workers could also be considered.

Going further in progressivity of the tax system

Taxation can be used to correct inequalities, as some have already proposed. For Thomas Piketty, the progressivity of income tax is a good tool to address inequalities. Indeed, the 20th century introduced and experimented extensively with progressive income taxes as a powerful tool for financing the social state, compressing income disparities and promoting a more egalitarian and prosperous economy. He argues that the 21st century should extend this legacy by introducing and widely experimenting with a progressive wealth tax to better circulate property, power and participation in all its forms in society[21]. In the UK, the cost of buying a house or property increases in proportion to income. As a result, it takes a very high income to buy, whereas previously it was possible with a low income. Again, taxation can help to eliminate disparities within a generation by introducing a wealth transfer tax or a wealth tax. More specifically, Thomas Piketty makes the proposal to introduce a progressive wealth tax that would finance the payment of a minimum inheritance to everyone at the age of 25, in the order of 120 000€ for each, amount that corresponds to 60% of the average inheritance in France. In return, measures must be taken to reduce the income received from large inheritances in order to reduce the overall gap in inheritances received.

Note 21 Piketty, Une brève histoire de l'égalité, Editions du Seuil, 2021.

Strengthening the control of expenditures and revenues

In general, the use of new technologies can contribute to improving tax collection in order to reduce tax gaps and make the system more efficient, provided that the rights of the taxpayer are respected. In order to rationalize tax expenditures, one can also reserve tax incentives for products or services that meet predefined multifactorial criteria such as social, budgetary, environmental, economic, energy, cultural or security utility. Or, one may think about the distribution of revenues according to what needs to be improved, by better allocating revenues, for example in the area of climate change, to build the necessary infrastructure to protect against climate phenomena or to support green or other investments.

5. How to rethink the corporate taxation?

The BEPS reform has put the spotlight on the future of corporate taxation. The uncertainties surrounding its successful implementation have raised hopes for new tax policies for the future that would favor destination and consumption, abandon or modify the arm's length principle and to ensure legal certainty for companies.

Favoring destination and consumption

The principle of destination-based cash flow is advocated by some authors as having the best economic efficiency[22]. Indeed, this system allows for better tax collection and more difficult profit shifting. It avoids economic distortions caused by shifting activity to low-tax-rate locations. Allocating taxing rights to the destination country is advantageous if transaction costs are not too high and if an appropriate form of taxation can be implemented. The tax rate should be determined by the location of a relative immobility factor, given that the consumer's place of residence is more immobile than his place of consumption. Moreover, broad-base consumption taxes seem to be the best alternative to cross-border flows. The rapid extension of VAT shows that the focus is increasingly on consumption tax and that it is increasingly difficult to apply capital income tax because of its cross-border nature. It therefore seems logical to tax

Note 22 Devereux, Auerbach, Keen, Oosterhuis, Schön, and Vella, Taxing Profit in Global Economy, Oxford, 2021.

where the immobile consumer is in order to meet the challenge of international capital mobility. Consideration could also be given to broadening the income tax base to include fewer exemptions and concessions.

Abandoning or modifying the arm's length principle

One of the criticisms of the BEPS reform is that it seeks to move away from the arm's length principle without actually doing so. The idea of removing the arm's length principle is based on the fact that it was not well thought out from the beginning and will continue, despite the reforms, to pose difficulties with respect to price manipulation or price determination. Maintaining this principle might make sense if the right price was simple to determine.

The arm's length principle emerged as a way to escape the complexity of the formula apportionment system contained in the 1920 League of Nations work. This system, which had been proposed as a way to allocate tax profits to multinationals across jurisdictions, may come in the future. The main idea was to evaluate the overall profit of a company in order to allocate parts of this profit to different countries based on different factors (assets, labor, sales). We find this idea in the 21st century. Indeed, in the EU, the CCCTB - and its successor the BEFIT project (Business in Europe Framework for Income Taxation) – relies on a variant of the apportionment formula to allocate corporate profits between member states and on the transformation of the accounting and tax information system of companies to reduce the administrative costs of documentation and reprocessing. It therefore seems possible to retain both concepts. Some authors have even proposed revisiting the arm's length principle in the future by considering the concept of "value generation" focusing on value reflected in labor or income rather than market or exchange value (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4060111).

Ensuring legal certainty for companies

The strengthening of compliance measures and the implementation of international reform are of concern to companies. Some measures seem to be necessary to reassure them. Indeed, a number of tax policies must be taken in order to guarantee the confidentiality of the company's business practices, strategic position or tax documentation. Companies must also be protected from the reputational risk incurred by the erroneous

analysis of its public documents, as may be the case with the CbCR requirements. Some rules must also be put in place to reduce the cost of adapting the reform to groups and to avoid multiple taxation.

6. How to improve the legal rule?

To improve the legal rule, future tax policies will have to focus on its design and its application.

The design of the legal rule

Efforts can be made in three different directions. The first direction is the rewriting of the law, which has already been initiated in some countries such as the United Kingdom in 1996 through a parliamentary procedure, with the support of a joint committee (the Tax Law Rewrite). This work has just been undertaken in France through codification commissions placed under the authority of the Prime Minister. The objective is to rewrite the General Tax Code and to create new codes, such as the Tax Code on Goods and Services, which has just been published (ordinance n° 2021-1843 of December 22, 2021). To take into account new technologies, it will also be necessary to adapt the writing style to facilitate the execution of a smart contract in tax matters, by developing the control and verification capacity of the code that integrates the legislation.

The second direction is the clarification of the legal rule. It seems necessary to eliminate or revise some concepts such as permanent establishment or the arm's length principle. The boundaries between some other concepts need to be redefined, such as the source-residence, avoidance-evasion, support-aid-subsidy or passive-active income distinctions. Constitutional clarifications could also be made for new topics such as technological, digital or climate issues, and a multilateral convention could be considered in the area of non-discrimination to better regulate tax subsidies and international aid.

The last option is the simplification of the legal rule. This simplification could be done at the level of some European directives, which remain increasingly complex to read. As far as conventions are concerned, the idea has been considered of formulating only one conventional model. The elaboration of a single multilateral basis common to all States, representing all the interests involved, could give rise to reflection. Another idea would be to consider that developing countries work only on a withholding tax basis, with a dedicated tax credit that would be formalized in a technical agreement.

The application of the legal rule

If the reform were to be implemented, it would probably be necessary to explain the coordination of different multilateral conventions among themselves and to provide a simplified guide or manual to explain how these different conventions or models will apply. More specifically, with regard to the role of the judge in the application of legal rules, several ideas have been put forward. First, it seems necessary to regulate the possibility of enacting retroactive laws for the sole purpose of circumventing a judge's decision. Second, the idea of issuing judgments for the future was considered in order to give taxpayers or public authorities time to take the necessary steps to respond to the judgment. Finally, it would be interesting to intensify the dialogue of judges to help them working on similar issues in different countries to better exchange.

7. How to improve the dispute resolution mechanism?

In order to improve the tax dispute resolution mechanism, the creation of new mechanisms could be considered as well as the improvement of existing ones.

New mechanisms

A first proposal appears in a public consultation document on Pillar 1 which proposes the implementation of a dispute resolution panel process (https://www.oecd.org/tax/beps/public-consultation-document-pillar-one-amount-a-tax-certainty-issues.pdf). The procedure is described in the annex in four main steps starting with a MAP stage, the appointment of the dispute resolution panel, the deliberation of the dispute resolution panel and choice of resolution and the implementation of the resolution. A specific timeline is provided for each of these steps. It is interesting to note some commonalities with the WTO dispute settlement mechanism, suggesting a possibility for the OECD to have its own dispute resolution system in the future.

Another interesting mechanism is proposed in the context of mutual administrative assistance, to develop join tax audits through new models of international administrative agreements to combat double taxation of corporate profits[23]. Closer cooperation between tax administrations in the field of audits of taxpayers involve in cross-border economic activities is neces-

Note 23 Isabella Zimmerl, Joint Tax Audits als Ausgangspunkt zur Effektuierung des Verständigungsverfahrens, Beck, 2022.

sary and the proposals made by the author allows the state to exercise its power outside its territory.

A more ambitious idea is the creation of an international tax jurisdiction, independent and accepted at the international level, suggesting that all states go beyond questions of tax sovereignty. This idea is not new, since Vito Tanzi envisaged it "probably in the XXII century"[24]. The question is to know which forum is most likely to host such a jurisdiction: the OECD, the WTO or the UN? The choice of one of these organizations can be discussed on the basis of their legitimacy and their capacity to host such a function. Another possibility would be to attach this function to an existing international jurisdiction.

Improvement of existing mechanisms

One of the main difficulties for companies is the inability to reduce judicial and treaty delays, which can sometimes be very long and can prevent the taxpayer from taking action. In addition, the MAP system is bound to reveal its limitations during the implementation of BEPS reforms and the lack of effective systems in place could encourage reform of existing systems.

A specific proposal has been put forward by a group of academics. It aims to establish a dispute resolution mechanism that mirrors the MAP of tax treaties[25]. Indeed, the MAP provided for in article 25 §3 of the OECD MC can be a way of handling GloBE disputes if it is clarified and strengthened. This applicability could be contested and some national systems or tax treaties could be an obstacle to the implementation of this possibility. For all these reasons, it is proposed to add this possibility to the commentaries of the article 25 of the OECD MC and to introduce in the GloBE Model Rules a national model provision that takes up the framework of Article 25 §3 OECD MC. Finally, the interaction of this proposal with the Convention on Mutual Administrative Assistance in Tax Matters is made in order to propose two options for better coordination.

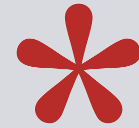
Other proposals can be mentioned. First, the WTO Dispute Settlement Body, which is already involved in inter-state tax

Note 24 V. Tanzi, « Globalization and the Future of Fiscal Protection », Working Paper IMF, no 00/12, January 2000.

Note 25 Danon, Gutmann, Maisto and Jimenez, 2022: https://media-exp1.licdn.com/dms/document/C4E1FAQH-rHvhu1DSzw/feedshare-document-pdf-analyzed/0/1650617359700?e=1654732800&v=beta&t=opeg0BPpQw8XiRbb1ggCpfHzsl--pX8yoPiblH9_XFI.

justice, could be reformed to help countries resort to arbitration, to make its sanctions more effective, and to break the political deadlock that paralyzes litigation activity. Second, the development of other alternative dispute resolution methods could be envisaged, for example by imagining independent facilitators such as those that exist within the WTO. Finally, courts in developing country should be able to handle disputes rather than go to arbitration. If they decide to do so, it should be possible to imagine institutionalizing international tax arbitration by creating a specific international body that would serve as a forum in this area, with equal representation from developing and developed countries.

Since the future is by definition uncertain, let us not be afraid to imagine other developments for taxing the future.



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persons interviewed

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Written remarks:

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