

# eJournal of Tax Research

Volume 2, Number 1      2004

## CONTENTS

- 5      Editorial Announcement
- 6      The Cedric Sandford Medal
- 8      **Is an International Tax Organisation an Appropriate  
Forum for Administering Binding Rulings and APAs**  
**Adrian Sawyer**
- 71     Aligning Taxable Profits and Accounting Profits: Accounting  
standards, legislators and judges  
**Judith Freedman**
- 100    Towards an Electronic Filing System: A Malaysian survey  
**Ming-Ling Lai, Siti Normala Sheikh Obid and Ahamed  
Kameel Meera**
- 113    The Evolution of the Informal Economy and Tax Evasion in  
Croatia  
**Katarina Ott**
- 125    New Modalities in Tax Decision-Making: Applying  
European experience to Australia  
**Yuri Grbich**

# Is an International Tax Organisation an Appropriate Forum for Administering Binding Rulings and APAS?<sup>+</sup>

**Adrian Sawyer\***

## ***Abstract***

This paper presents the results of ongoing research into developing a World Tax Organisation for advancing tax policy and practice. Specifically it focuses on the driving forces for such a body, including that of harmonisation and globalisation, along with forces of resistance, including that of national sovereignty. The paper reviews the contributions of various scholars and seeks to build upon their efforts, focussing particularly upon areas that could form part of the scope of this international organisation, namely binding rulings and advance pricing agreements. The paper is far from the definitive analysis of the surrounding issues; rather it is part of the author's ongoing research, including eventually developing possible operational aspects of a possible World Tax Organisation.

## **INTRODUCTION**

With the increasing globalisation<sup>1</sup> of business activity, mobility of capital (and to a lesser degree individuals),<sup>2</sup> and the blurring of jurisdictional boundaries,<sup>3</sup> the setting of domestic tax policy has taken on an increasingly international application. As a consequence of this international dimension, tax policy and practice cannot, or at least should not, be developed by a country in isolation of the international implications.<sup>4</sup> Territorial tax competition, one potential outcome of international tax policies, has been criticised as an inefficient mechanism for economic activity when assessed from global perspective.<sup>5</sup> International economic cooperation and policy coordination has

---

<sup>+</sup> This is work derived from part of my SJD dissertation.

<sup>\*</sup> Senior Lecturer, Department of Accountancy, Finance and Information Systems, University of Canterbury.

<sup>1</sup> Globalisation may be summarised as a metaphor for a way of describing a variety of non-linear processes of change on a global scale; *see* GORDON WALKER, *Introduction, to G*

been suggested as important in the operation of the international monetary system,<sup>6</sup> and with the growing internationalisation of business activities and investment,<sup>7</sup> cooperation and coordination should also be debated in the context of international tax policy.

The international tax environment is changing rapidly.<sup>8</sup> Social and economic conditions are changing almost constantly, along with a technological revolution that is challenging the traditional ways that tax systems operate to determine liability for tax. James<sup>9</sup> suggests application of the STEP analysis, where relevant social, technological, economic and political factors are each examined in turn. James<sup>10</sup> concludes that tax systems are likely to become more complex, that they will become increasingly global and more competitive.

and has the potential to make an important contribution to the literature and to the development of future international tax policy and practice. Development of a framework through the means of a best-fit response to key issues has the opportunity to facilitate future research and scholarship in this area.

Part of this framework necessarily involves some form of overarching international organisation to oversee and implement the proposals. In this paper, the organisation to undertake this role, a World Tax Organisation, is also used interchangeably with the title International Tax Organisation; both intended to represent the same proposed international body.

Furthermore, it is my contention that the phenomenon of cooperation has not evolved to a position whereby mutual considerations in devising, revising and implementing tax policy have been fully embraced, particularly on income that is derived across jurisdictional boundaries. A step down this path would be to include a mutually agreeable process in the areas of binding rulings and APAs that encompass business and income with cross-border implications. On the other hand, it could be argued that a mutual tax policy setting process in any area is a utopian ideal which in itself requires separate investigation and justification.<sup>14</sup> Beyond the OECD countries, there are an immense number of developing and transition nations experiencing the implications of globalisation.<sup>15</sup>

OECD countries,<sup>16</sup> representing the world's major developed industrial nations and several developing nations, have experienced significant changes in tax policy over the past ten to fifteen years; in fact the changes have reflected a high degree of simultaneity in implementation.<sup>17</sup> However, in developing international tax policy, the United States is a major, if not dominant player, and has been so for decades.<sup>18</sup> Consequently developments in the tax policy literature in the United States should prove fruitful in exploring the processes of setting international tax policy and its application in practice.<sup>19</sup>

In looking to the tax systems of the twenty-first century, a number of difficult questions need to be answered, including<sup>20</sup>:

- What new problems do the future demographic and economic developments imply?
- What new tax bases will be available?

---

<sup>16</sup> The 30 OECD member countries, as at the end of 1998, are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, (Republic of) Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

<sup>17</sup> Martin Hallerberg and Scott Basinger, *Internationalization and changes in OECD countries: The Importance of Domestic Veto Players*, 31 COMP. POL. STUD. 321 (1998). Internationalisation is cited by the authors as a major force in the downward convergence of tax rates (p. 322). The results, according to Hallerberg and Basinger, suggest that capital is mobile, seeking after favourable tax treatment (the phenomenon of tax competition). See generally KEN MESSERE, *TAX POLICY IN OECD COUNTRIES* (1993).

<sup>18</sup> See e.g. Stanford G. Ross, *A Perspective on International Tax Policy*, 26 TAX NOTES 701 (February 18, 1985). In the context of advocating a United States tax regime that promotes consolidated worldwide income and taxes rather than focussing on nationalistic U.S. tax rules, see Stanford G. Ross, *US International Tax Policy: Where are we? Where should we be going?* 47 TAX NOTES 331 (April 16, 1990). For a more recent discussion by Ross on national versus international approaches to tax policy, see Stanford G. Ross, *National versus International Approaches to Cross-Border Tax Policy Issues*, 4 TAX NOTES INT'L 719 (April 8, 1992). Also, Ross provides a 20-year view of United States international tax; see Stanford G. Ross, *International Taxation: A 20-Year View*, 57 TAX

- What will happen with regard to existing main revenue sources – indirect taxes, labour taxation, capital taxation, and business taxation?
- What new means of control will tax administrations get and what new difficulties will they meet?
- Another commentator had observed with respect to tax policy in the twenty-first century<sup>21</sup>:

A way to focus attention on the importance of reforming the taxation of international income is to consider what the world will be like in the 21st century. It seems unquestionable that increasingly markets will become global, national power will equate heavily with economic power, and technology will lead to a world of faster communication and more transactions. Present tax rules based on geographic residence of taxpayers, the geographic source of income, and physical location of assets will become increasingly irrelevant to real business and economic activities. Applying these rules undoubtedly will impose an increasingly deadweight cost on commerce unless reformed.

The internationalisation of domestic tax policy<sup>24</sup> has serious ramifications for governments as they jealously guard and protect their sovereign rights to tax their

principles, rather than legal definitions, is advocated as the preferable manner to determine who is liable to pay United States taxes.<sup>32</sup>

Currently there are numerous other international policy issues which need to be resolved in the twenty-first century. For example, such issues encompass dealing with changes in demographics, which in itself creates a series of sub-issues, including inducing greater demand for increased user charges, emergence of an austerity environment, international factor mobility and the growing integration of the world economy, and virtual computerisation of all transactions.<sup>33</sup>

**Tax policy and international trade<sup>34</sup>**

A further approach to viewing international tax policy and its application is that of recasting it in parallel with the theory of international trade. Slemrod identifies two major advantages from this approach.<sup>35</sup> The first is that tax policy has at least as large an effect on the flow of goods across countries, the location of productive activity and



At its most basic, there is nothing mysterious about globalisation. The term has come into common usage since the 1980s, reflecting technological advances that have made it easier and quicker to complete international transactions - both trade and financial flows. It refers to an extension beyond national borders of the same market forces that have operated for centuries at all levels of human economic activity - village markets, urban industries, or financial centres.

The concept or phenomena of globalisation<sup>39</sup> has implications not only in the context of its impact on trade and business, but also with respect to its impact on nation states and people, especially cultural groupings. One of the critical issues affecting international taxation currently is that globalisation has now become a tax problem rather than merely an issue for financial markets.<sup>40</sup>

Globalisation requires, or perhaps forces, a high degree of consensus policy and appropriate mechanisms to cater for the innovations that it has spawned, such as in the internationalisation of financial markets.<sup>41</sup> Globalisation clearly brings pressure to bear on traditional tax principles,<sup>42</sup> and is an issue that confronts tax policymakers for three principle reasons.<sup>43</sup> First, globalisation offers firms and businesses more freedom over where they locate. The improvement in capital mobility with globalisation of financial markets facilitates this freedom. With the ascendancy of residence-based taxation (or locale of a permanent establishment<sup>44</sup>), businesses can choose to operate from tax ha

jurisdictions. Such competition may be dominated by the larger players through cooperative oligopolies (implemented by way of modified tax treaties) or through misuse of a dominant position, where powerful tax havens promote the benefits of their services to a larger group of potential clients.<sup>48</sup>

An appreciation of the implications of globalisation is vitally important to developing (international) tax policy.<sup>49</sup> Globalisation may be contrasted with the notions of internationalisation<sup>50</sup> and regionalisation,<sup>51</sup> both of which have received attention in the literature.<sup>52</sup>

### **Globalisation, Internationalisation or Regionalisation?**

Delbrück defines internationalisation as "... a means to enable nation-states to satisfy the national interest in areas where they are incapable of doing so on their own."<sup>53</sup> He also introduces the concept of renationalisation in the context of ethnic and religious conflict since the end of the Cold War. Delbrück also suggests renationalisation is present in the European Union.<sup>54</sup>

According to Stace<sup>55</sup> there are three waves of internationalisation that may be observed: the commodity exporter phase of the 1940s-1970s, the global opportunist phase of the 1980s (characterised by financial deregulation), and the exporter and

Internationalization: Cross national flows of goods and services effected by enterprises by either export/import or direct investments abroad involving operations in one or a number of countries. Globalisation: A more advanced form of internationalisation involving the increasing spread of economic activities across national and regional borders, characterized by global products, global innovation and global competition.

Globalisation may also be compared to nationalism, which can be seen as both a reaction against globalisation and is a product of globalisation.<sup>57</sup> In this regard Harris states<sup>58</sup>:

Globalisation forces a rethinking of the role of the nation state, its degree of autonomy in setting policies, and the degree to which national economics can usefully be analysed as separate units. It may well be that inter-national economics may become obsolete and be replaced by a focus on either the regional (time zone) economy or the global economy.

Regionalism involves a significant degree of geographical proximity and a high degree of economic interdependence to be successful. It involves a process of growing informal linkages and transactions derived primarily from economic activity but involving social and political interconnectedness.<sup>59</sup> Regionalism may involve a regional awareness or identity, interstate cooperation, state-promoted regional economic integration, or regional cohesion.<sup>60</sup> Regionalisation rather than full embracing of globalisation may be the preferable approach for United States Multi-National Enterprises (MNEs), although this recommendation was offered during the early period of financial globalisation, that is, the early 1990s.<sup>61</sup>

#### **Globalisation and taxation generally**

As noted previously, globalisation has a far reaching impact beyond just financial instruments and commercial securities regulation; it extends to the taxation treatment of such instruments, and to the derivation of income and transactions involving goods and services.<sup>62</sup> As such, tax policy issues require resolution beyond the ability that any one nation has to conclude unilaterally, if global efficiency is to be maximised.<sup>63</sup>



Figure 1 below, which contains an example of each major point on the continuum currently in operation.

**Figure 1: Competition/Harmonisation Continuum**

<i>Competition</i>		<i>Cooperation</i>		<i>Harmonisation</i>	
<i>Unregulated</i>	<i>Regulated</i>	<i>Regional or Partial</i>	<i>Global or Full</i>	<i>Regional or Partial</i>	<i>Global or Full</i>
Tax havens	Anti-trust Global trading of securities	OECD NAFTA APEC/ASEAN	GATT/WTO U.N.	E.U.	???

Tax competition may be defined as “competition between different tax jurisdictions to encourage businesses and individuals to locate in their areas.”<sup>71</sup> Debate continues over whether competition is desirable (it is certainly a fundamental concept underlying the free market system for global trading in goods and services and financial instruments), although a consensus has emerged in OECD nations at least, that competition, in the area of taxation at least, can be harmful and measures should be put into place to counter the distortions that arise.<sup>72</sup>

Tax cooperation, from an international perspective, represents a position lying between the extremes of this continuum, whereby nations work together for their

be carried out in the E.U. through a supra-national European (Corporation) Tax. Such a proposal is dismissed by Hinnekens as falling outside the European Community's objectives and, in reality, is impossible to achieve in the context of the proposals I develop in this paper.

A hurdle in making further progress in the E.U. over direct tax harmonisation has been the absence of specific harmonisation requirements in the European Treaty.<sup>78</sup> A further frustration in some instances is the requirement for unanimous agreement.<sup>79</sup> In regional groupings which extend beyond one particular agreement, unanimity is more important than with only a single agreement that is left open for ratification and binding only on those that ratify<sup>80</sup> (assuming sufficient countries ratify the agreement to allow the agreement to be effective).<sup>81</sup> Some form of super-majority endorsement procedure<sup>82</sup> is recommended over a simple majority (greater than 50 percent) or a slow ratification approach (such as until unanimous ratification occurs).

Tax havens have been raised as an obstacle to establishing a unanimous agreement in the context of how they create unfair competition.<sup>83</sup> However, tax havens are extremely unlikely to be a party to any agreement in setting tax policy, given their reluctance to enter tax treaties in many instances.<sup>84</sup> However, certain OECD member countries that offer significant tax concessions, such as Ireland, Luxembourg and Sweden, are possible participants or signatories to the proposed international agreement.<sup>85</sup> Furthermore, it will be important to have transition and developing nations that are able to meet the criteria of an advanced and stable tax system, to be members of this international tax policy setting agreement.

### **Tax policy and coordination**

Markets promote efficiency through competition and the division of labour - the specialisation that allows people and economies to focus on what they do best. Global markets offer greater opportunity for people to tap into more and larger markets around the world. It means that they can have access to more capital flows, technology, cheaper imports, and larger export markets. But markets do not necessarily ensure that the benefits of increased efficiency are shared by all. Countries

---

No 23, (1999), at 133-168 (discussing the need for tax coordination in the E.U. and the rest of the (developed) world).

<sup>78</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1

must be prepared to embrace the policies needed, and in the case of the poorest countries may need the support of the international community as they do so.

Commentators have also suggested that the current approach to handling international tax issues through bilateral treaties is outdated and inefficient,<sup>86</sup> reinforced by the philosophy behind the first League of Nations Model Treaty,<sup>87</sup> and as subsequently developed by the OECD. The OECD's contributions initially were in an era when the U.S. was a primarily an exporter of capital, preferring capital export neutrality and a residence-based taxation approach.<sup>88</sup>

Owens<sup>89</sup> considers the option of co-ordination or 'peaceful co-existence'. Here the objective is to have tax systems which are responsive to market forces, which can reflect the specific situation found in each country and which at the same time do not interact in ways which adversely affect the international allocation of resources. Co-ordination, argues Owens,<sup>90</sup> can play a useful role in preventing large countries taking unilateral actions which impose costs on other countries, particularly on small, open economies. Only by co-ordination, contends Owens,<sup>91</sup> can a certain degree of national autonomy be maintained in tax policy. The question is, can this be achieved and if so, how? Owens aptly suggests that any new initiatives should build upon the existing instruments and existing institutions, including the current large network of tax treaties.

Owens suggests that the following initiatives could be added to assist with coordination:<sup>92</sup>

- 1) *Developing guidelines for the use of tax incentives.* This would require agreement on what constitutes a tax incentive, how its cost should be measured, and its likely effects. The [New Independent States] (NIS), the eastern European countries, the EC and NAFTA countries - or more ambitiously the OECD countries - would be in a position to implement such agreements. A second option would be to encourage the development of internationally comparable tax expenditure accounts so that cross-country comparisons of the significance of deviations from the normal corporate tax regimes could be evaluated. Thirdly,

---

<sup>86</sup> See e.g. Richard J. Vann, *A Model Tax Treaty for the Asian-Pacific Region* (Part 1 and 2), 45 BULL. INT'L FISCAL DOC. 99, 103 (1991), 45 BULL. INT'L FISCAL DOC. 151 (1991), and John Azzi, *Tackling Tax Treaty Tensions: Time to Think about an International Tax Court*, 52 BULL. INT'L FISCAL DOC. 344, 349-50 (1998).

<sup>87</sup> *Report Presented by the Comm. Of Technica*

countries could be encouraged to move from tax allowances and holidays towards tax credits since this would improve the transparency of the subsidies (although cash grants would be even more transparent). Fourthly, the international community could try to develop common guidelines for the types of tax incentives which would be eligible for tax-sparing provisions in countries which do not have the exemption system in their tax treaties (although another solution would be to follow the United States approach which denies tax sparing altogether).

- 2) *Convergence of taxes on income and capital.* The OECD and other international







and the role of tax treaties in protecting and relaxing sovereignty in an attempt to arrive at a consensus between signatories.<sup>112</sup> Culture is a further variable requiring consideration.<sup>113</sup>

### **Sovereignty – A key inhibiting factor**

Crucial limitations or inhibitors to effectively implementing a multilateral agreement or treaty of the nature envisioned by this study exist, including a number of constitutional and jurisprudential concerns that could arise should a country be prepared to forgo or place restrictions on its sovereign rights to determine tax policy.<sup>114</sup> Furthermore, the traditionally held stance that tax policy may be utilised to implement national social policy goals restricts the willingness of nations to give up further control over their tax system.<sup>115</sup>

Sovereignty<sup>116</sup> has been raised in the context of international trade<sup>117</sup> and regionalism,<sup>118</sup> globalisation,<sup>119</sup> subsidiarity in the E.U.,<sup>120</sup> and taxation.<sup>121</sup> A related issue is that of how cultural differences between nations act as an inhibitor to closer harmonisation between nations.<sup>122</sup>

In relation to taxation, sovereignty may be viewed as “... the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the

---

Daniel Salée, *NAFTA, Quebec and the Boundaries of Cultural Sovereignty; The Challenge of Identity in the Era of Sovereignty*, in JOINING TOGETHER, STANDING APART: NATIONAL IDENTITIES AFTER NAFTA 73, 81, (Dorinda G. Dallmeyer ed., 1997). Cultural sovereignty may refer to groups of people within a nation-state or the nation-state itself (or a region), but this is increasingly becoming pluralistic; see *Id.* at 75.

<sup>112</sup> Bilateral tax treaties create numerous interpretation difficulties, a multilateral treaty is not dissimilar in this respect; see e.g. Russell K. Osgood, *Interpreting Tax Treaties in Canada, The United States and the United Kingdom*, 17 CORNELL INT'L L. J. 255 (1984). See also, PHILIP E. POSTLEWATE, AND TAMARA L. FRANTZEN, *INTERNATIONAL TAXATION: UNITED STATES TAX TREATIES*, (1993), and Julie A. Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753 (1995).

<sup>113</sup> See e.g. Salée, *supra* n 111, and Grant Richardson and Roman Lanis, *Harmonizing Taxation Law within APEC: A Fiscal and Cultural Analysis*



	(sovereignty)	(sovereignty)
--	---------------	---------------

One interesting issue raised by another scholar in this area is that even if sovereignty is lost by a nation, is it necessarily lost irrevocably because someone else gains it?<sup>133</sup> Sovereignty is not a universally defined concept, a fact which contributes to the debate over the impact that globalisation is having on sovereignty, especially within its legal and political dimensions.<sup>134</sup> It can be argued that no sovereign states remain any more in Western Europe (the E.U. in particular), but this does not mean there is a sovereign European Community in their place.<sup>135</sup> The implication of this argument for rethinking jurisprudence and legal philosophy, however, is beyond the scope of this paper. Notwithstanding the argument that sovereign states no longer exist, sovereignty, or what is left of it, is jealously guarded (or raised in opposition to proposals for change), for example, by the European Member states when it comes to direct tax harmonisation<sup>136</sup> and to jurisdiction.<sup>137</sup> Therefore sovereignty remains a hurdle to be overcome if the proposed international tax policy setting and dispute resolution process is ever to become a practical reality.

In relation to the social impact of globalisation, there is a necessary trade-off between globalisation and sovereignty, which Rugman has illustrated by the following matrix, as set out in Figure 3<sup>138</sup>:

**Figure 3: Globalisation and Sovereignty**

Sovereignty

Low

--	--

Progress towards instigating some form of mutual policy process and international tax organisation will be challenged by obstacles and enhanced through various facilitating factors. To gain an appreciation of these obstacles requires a comprehensive review of the general constitutional, jurisprudential and in particular, the sovereignty environment, predominantly in OECD countries. A comprehensive analysis is beyond the scope of this paper. Jurisdictional preferences currently provided through national revenue statutes will need to be accommodated for in some manner if they are not to be an insurmountable hurdle to developing policy that maximises global revenue from an efficiency perspective.<sup>139</sup>

It is anticipated that any recommendations culminating in a mutual tax policy setting process and appropriate form(s) of institution to resolve disputes associated with this process are expected to be contentious. To fully develop the proposals the necessary form of regulation or scope of a collective authority that is appropriate to facilitating a mutual approach, in the context of globalisation, need to be investigated. Furthermore, development of any policy and organisation is anticipated to require treaty modifications.<sup>140</sup> Not surprisingly, tax treaties and their interpretation will be a major factor in developing aspect of this study further, including multilateral treaties and the problems associated with arriving at an agreement.<sup>141</sup>

Determining a consistent tax base for application of tax policy is also important, (but beyond the scope of this paper), although consistency in tax policy, I would argue, extends beyond merely having a consistent tax base, to areas such as information disclosure and sharing, and employing fundamental principles consistently, such a taxation on a source or a residence basis. One further issue is whether any policy should have retroactive effect in particular defined circumstances.<sup>142</sup>

---

<sup>139</sup> See *Id.* for a further discussion of taxation as a social expenditure and revenue raising instrument and national sovereignty.

<sup>140</sup> See Julie A. Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753 (1995). One area in which revision may currently be required is the non-discrimination rules; see Robert A. Green, *The Troubled Rule of Non-discrimination in Taxing Foreign Direct Investment*, 26 LAW & POL'Y INT'L AFFAIRS 103 (1994). See also, H. David Rosenbloom, *Toward a New Tax Treaty Policy for a New Decade*, 9 AM. J. TAX POL'Y 77 (1991). One further advantage with a multilateral agreement is that treaty-shopping for the most favourable tax treatment should be reduced; see Mimi E. Gild, *Tax Treaty Shopping: Changes in U.S. Approach to Limitation on Benefits Provision* 300M



Globalisation implies that many national policies come to have effects beyond a country's borders. It, thus, tends to create frictions between the developments described above and traditional, national policies or institutions which, to a large extent, still reflect the closed-economy environment and thinking that existed when they were first developed or created. ...

The tax systems of many countries came into existence or developed at a time when trade among countries was greatly controlled and limited and when large capital movements were almost non-existent. ...

In the environment described above the application of what is sometimes called the "territoriality principle," which gives a country the right to tax all incomes and activities within its territory, did not cause conflict or difficulty. Tax policies by any one country could be pursued without much concern or much thought about how they would affect other countries. Equally, the tax policies of other countries were of only marginal, if any, interest to a country's policymakers because they did not affect the behaviour of its citizens. ...

Globalisation and the progressive integration of world economies have been changing all this. In the present environment the actions of many governments have come to be greatly constrained or influenced by the actions of other governments, and spillover-effects across frontiers generated by taxation have become common and important."

Tanzi concludes his study by stating<sup>146</sup>:

The connection between globalisation and taxation is particularly complex because of its interconnection with tax competition and because of the large number of actors. Globalisation increases the scope for tax competition because it provides countries with an opportunity to export part of their tax burden to other countries. Some countries will use or even abuse this opportunity. Tax competition may magnify the inevitable effects of globalisation. However, the complexity of the likely reactions of the countries makes the end result difficult to forecast. The fact that there is no world organization with the explicit responsibility to provide a sort of surveillance on the behaviour of countries in tax matters makes tax competition more likely.

The world is waking up to the realization that tax competition is not always a good thing. In fact it may create difficulties for countries by (a) eventually





been relatively contained, but now even smaller organisations can trade and bank globally, and location and identity become more difficult to determine.

Pinto goes on to observe<sup>152</sup>:

In sum, the absence of borders and the lack of border controls undermines the jurisdictional rules of source and residency as they are currently

- The base for taxes on income and wealth will become more geographically mobile and therefore more sensitive to tax differentials. This, in turn, will lead to a greater danger of tax competition between countries, with each country trying to attract a larger share of the global tax base.
- It will become more difficult to determine and to collect taxes on activities which take place outside a country's tax jurisdiction. This is not just a question of the volume of cross-border transactions increasing, but of their changing nature.
- The ways in which tax administrations carry out their 'business' will change. New technologies open up new ways of assessing and collecting taxes, and for co-operation between tax authorities in different countries.

Owens outlines his recommended options for governments to deal with the impact of globalisation of taxation policy and revenues, emphasising three key choices: entering into a process of full harmonisation of tax systems; allowing competitive forces to determine the design of each country's tax system; or undertaking greater coordination between the tax policies followed by countries.<sup>154</sup>

Writing more recently, Owens is optimistic about the likelihood of a positive outcome from globalisation, although he identifies risks that such an outcome may not materialise.<sup>155</sup> For instance<sup>156</sup>:

- *globalisation could lose its momentum* (such as the recent setback in Seattle [for the recent round of GATT talks]), particularly if the United States and Europe fail to provide the required leadership;
- *new barriers*, some of which may be tax barriers, *may be erected between financial markets*, increasing the cost of capital or denying access to innovative financial products;
- *regional blocks will become inward-looking*, leading to a rise in tensions between them;
- *citizens and government will revolt against the dominance of big business*; and
- *the nation state will be strengthened.*"

The implications for tax administrations, from Owens' perspective, assuming governments accept the challenges of globalisation, are<sup>157</sup>:

- the rules that were developed in the physical economy may be seen as inappropriate for the virtual economy;
- governments would need to decide how to share the international tax base associated with the increasing number of very large multinational enterprises that dominate the world economy;

---

<sup>154</sup> *Id.* at 39.

<sup>155</sup> Jeffrey Owens, *Tax Administrations in the New Millennium*, 20 TAX NOTES INT'L 95 (Jan. 3, 2000).  
Emphasis added.

<sup>156</sup> *Id.* at 97.

<sup>157</sup> *Id.* at 97. Emphasis added.



the United States at least, reform of the current approach towards international tax policy is needed.<sup>163</sup>

International tax policy must be revisited in the light of the impact that financial globalisation, in particular, is having on income generation and consumption. Furthermore, the international aspects of domestic tax policy must also be revisited. Wilkinson observes in relation to the impact of globalisation on tax policy that<sup>164</sup>:

[i]n essence, the suggestion is that it is becoming progressively difficult for individual nations to pursue tax strategies without due reference to the implications of such policies in an international context. This is not to say that anything like an appropriate level of attention has been paid to international tax issues in the past. On the contrary, as pointed out by Ault and Bradford (1990)<sup>165</sup> in respect of the US situation, all too frequently: “International tax policy has been something of a stepchild in the tax legislative process. The international aspects of domestic tax changes are often considered only late in the day and without full examination.

Even beyond the need for countries to pay appropriate attention to the international implications of their tax policies is the fact that globalisation is progressively curtailing national fiscal sovereignty. Choice over tax policy alternatives is essentially being eroded. A discussion of tax reform issues at a symposium of OECD and non-OECD countries on tax reform was reported by Anderson (1990)<sup>166</sup> as indicating that:

While many of the recent reforms can be explained by domestic considerations, participants generally attached considerable importance to international factors. Tax distortions can be tolerated for much longer periods in a purely domestic context, perhaps because governments find the costs acceptable compared with the costs and disruption associated with reforms. However, with increasing internationalisation of economies and greater capital mo

commerce, Pinto<sup>169</sup> refines this adage by stating: “In a globalised economy, the problem lies not in obtaining the greatest amount of feathers, but in getting hold of any at all, for the goose is more elusive than ever.”

According to Spence,<sup>170</sup> the first role of international tax policy should be to protect national tax revenues (via adequately taxing profits once and allocating that tax in a sensible manner to each revenue authority), while the second should be not to get in the way of the operation of the world economy based on open markets (a tax system which is fiscally neutral and which minimises distortions).<sup>171</sup> As far as the international tax system is performing, in Spence’s view,<sup>172</sup> it has a reasonable track record in the light of its history. However, the international tax system is a product of history, where tax policy and laws generally commenced from the proposition of dealing with domestic corporations and income, and then were modified to deal with the international implications, albeit with the appearance of an afterthought.<sup>173</sup> Spence’s prescription for the only practical way forward is to<sup>174</sup>:

... build on the existing international framework. A step-by-step approach, which develops the current international standards on the principles which should apply to the taxation of international business, and which increases the effectiveness with which those international standards are applied in practice, by working through the essential detail, by adapting the rules to match up with commercial and business developments, and by getting tax authorities worldwide to apply the rules in a reasonably consistent fashion.

A blending of national and international tax policies is considered the most appropriate way to deal with the implications of globalisation, with national policies requiring increased modification to take account of changing international conditions.<sup>175</sup> Writing in early 1992, Ross<sup>176</sup> provides support for greater multilateral approaches to international tax relations, with measures similar to GATT considered to be necessary to deal with cross border r to GATT consi( fash)01.3( d338YL1(c0 Tw(176)Tj1u)-

Mintz acknowledges that globalisation can make it more difficult to impose taxes on income and value-added taxes (VATs) with the difficulties in determining source and place of income for cross-border transactions.<sup>179</sup> Globalisation is identified to raise numerous implications for tax policy, including base erosion for very mobile tax bases facing high tax rates, preferences taxing industries with high economic rents, determining where mobile income is earned, the place where VAT transactions occur, reductions in withholding taxes on interest, royalties and fees, significant cross-border movement of employees, the taxation of financial services and the growth in electronic commerce.<sup>180</sup>

This situation, in Mintz's view, necessitates some form of coordinated action from governments to reduce inefficiencies arising from tax exportation (setting too high taxes, affecting primarily non-residents) and tax competition (movement of income and taxpayers to other jurisdictions with lower rates).<sup>181</sup>

Mintz sets out five possible responses for governments to approach the effects of globalisation on tax policy<sup>182</sup>:

- 1) Stop globalisation - the 'Island' mentality - an approach which countries are unlikely to take and is extremely risky for their future economic productivity;
- 2) Reduce the size of Government - a step back to the past. This is expected to occur if tax policies are not coordinated internationally through governments improving their efficiency and cutting back public services in response to lower tax revenues.
- 3) Change the tax mix, through greater reliance on less mobile tax bases (such as consumption and labour).
- 4) Globalise taxes with major trading partners through greater international coordination or harmonization, including possibly a global tax base and allocation process.<sup>183</sup>
- 5) Creating a national advantage in global markets, such as through a coordinated national action plan, more competition, and a level playing field for the private sector.

One major effect of globalisation, in conjunction with liberalisation, is that while there may be improved resource allocation and prosperity around most of the world, the opportunities for tax evasion and avoidance have widened. This is particularly noticeable for income derived from profits, interest and dividends, which reflect a particularly mobile tax base, namely capital.<sup>184</sup> Globalisation has also changed the

---

<sup>179</sup> *Id.* at 100.

<sup>180</sup> *Id.* at 100-101.

<sup>181</sup> *Id.* at 101.

<sup>182</sup> *Id.* at 102-105. Emphasis added.

<sup>183</sup> This issue forms part of the intended role for an international organisation to monitor and implement international tax policy and for dispute resolution.

<sup>184</sup> See Steven Clarke and Flip de Kam, *OECD taxes revisited*, 214 *OECD OBSERVER* 28 (1998). See also Sven Steinmo, *The End of Redistribution? International Pressures and Domestic Tax Policy Choices*, 37 *CHALLENGE* 9 (1994), referring to the situation created by globalisation whereby the ease and availability of the exit option for those with large incomes and capital resources has dramatically increased, necessitating changes in tax structures and the level of intervention by governments. However, contrary to this view, Swank provides empirical evidence in his econometric study that there is little evidence to support the traditional view and that the direct effects of globalisation of capital

approach for tax advisers in providing advice to their clients, with the emphasis moving from the generalist to the extremely



Canadian provinces<sup>192</sup>).<sup>193</sup> Unitary taxation has been promoted by at least one commentator as the key to international tax harmony.<sup>194</sup> Issues that require resolution in adopting an international formulary apportionment can draw upon the existing experience of using unitary taxation.<sup>195</sup> The debate over which approach to determining allocation of income is beyond the scope of this paper – rather it is assumed that the arm's length price approach is to be maintained for the indefinite future.

### Importance of the subject matter

I have outlined above in summary form the impact that globalisation is having on trade and business, and that the internationalisation of the world has changed the manner in which business is conducted. I also argued that investments are now made on an international scale, where national or territorial limits are no longer a dominant factor. Global trading<sup>196</sup> and the growth in multinational corporations<sup>197</sup> have in combination blurred the traditional tax concept of jurisdiction as it relates in particular to the source of income and residence of the taxpayer.<sup>198</sup> Competition for the tax dollar has the potential to accelerate the “race to the bottom”<sup>199</sup> in terms of lower tax rates and on occasions increased exclusions of income from the tax base or greater deferral (and provision for more deductions and allocations), especially for highly mobile capital and the growing numbers of upwardly mobile and highly skilled labour.<sup>200</sup>

---

<sup>192</sup> See e.g. M. Daly, *Annex 9A: Tax Coordination and Competition in Canada: Some Lessons for the European Community*, in COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT OF THE COMMITTEE OF INDEPENDENT EXPERTS ON COMPANY TAXATION 383, (1992).

<sup>193</sup> See e.g. Richard M. Hammer, *Will the Arm's Length Standard Stand the Test of Time? The Specter of Apportionment*, in ESSAYS ON INTERNATIONAL TAXATION 201-212 (Herbert H. Alpert and Kees van Raad eds., 1993). See also Michael J. McIntyre, *Contrasting Methodologies: A Systematic Presentation of the Differences between an Arm's Length/Source-Rule System and a Combined-Reporting/Formulary-Apportionment System*, in 87 NAT'L TAX ASS'N CONF. 226 (Frederick D. Stocker and Janet L. Staton eds., 1995), and Richard D. Pomp and Michael J. McIntyre, *Double Trouble: Double Taxation Aspects of Formulary Apportionment in the International Context*, in 87 NAT'L TAX ASS'N CONF. 236 (Frederick D. Stocker and Janet L. Staton eds., 1995).

<sup>194</sup> Lance C. Tyson, *Unitary Apportioning: A Key to Global Tax Harmony*, 22 INT'L TAX J. 35 (1996).

<sup>195</sup> Joann M. Weiner, *Using the Experience in the U.S. States to Evaluate Issues in Implementing Formula Apportionment at the International Level*, 14 TAX NOTES INT'L 2113 (1996). In addition, the national tax base theory developed by Palmer will be evaluated as a further alternative; see Robert Palmer, *Toward Unilateral Coherence in Determining Jurisdiction to Tax Income*, 30 HARV. INT'L L. J. 1 (1989).

<sup>196</sup> See OECD, *THE TAXATION OF GLOBAL TRADING OF FINANCIAL INSTRUMENTS* (1998), and Charles Thelen Plambeck, *The Taxation Implications of Global Trading*, 48 TAX NOTES 1143 (1990).

<sup>197</sup> See e.g. MARTIN FELDSTEIN ET AL., *THE EFFECTS OF TAXATION ON MULTINATIONAL CORPORATIONS* 153-177, (Martin Feldstein et al. eds., National Bureau of Economic Research Project Report, 1995).

<sup>198</sup> For a discussion on source and residen7 0v150.Nnx59 141.88les,

Traditional concepts and principles have changed in other fields such as finance, with global trading and efforts towards implementing multilateral agreements,<sup>201</sup> and trade, with the conclusion of the General Agreement on Trade and Tariffs (GATT)<sup>202</sup> in 1994, along with the establishment of the World Trade Organisation (WTO) in 1995<sup>203</sup> to determine and resolve disputes over international trade in goods and services. Scholars have recognised the need for not only the United States international tax system to be reformed, but that internationally tax systems must face the challenges of the twenty-first century and beyond.<sup>204</sup>

In recognising the impact of globalisation on economic and social activi.

developments and the challenges they create, and in doing so, develops possible approaches, in the context of binding rulings and advance pricing agreements, to formulating an international tax policy setting and enforcement mechanism for the twenty-first century where the global marketplace is the focus.

## **BINDING RULINGS AND ADVANCE PRICING AGREEMENTS (APAS)**

### **Binding Rulings**

Taxpayers frequently desire foreknowledge of the tax consequences of transactions either before the associated arrangements become unconditional, or at least before a tax return is filed and a tax position is taken concerning the arrangement. Such a system may enhance efficiency of business operations within a complex tax system, provide greater certainty for taxpayers and improve the administrative processes of government.<sup>209</sup>





- to enhance the transparency of the decision-making process of the tax authorities in such a way as to improve the perception of the fairness of the tax obligations by taxpayers and thus tax compliance;
- to foster compliance with tax law and administrative practice;
- to improve the functioning of the self-assessment and self-reporting systems;
- to reduce tax litigation;
- to give the tax administrations the possibility to gather information from taxpayers; and
- to avoid harmful tax competition regimes and practices.

With further moves towards harmonising the E.U.'s corporate income taxes, Romano argues that it is necessary to ascertain the feasibility and opportunity to set up an advance tax rulings system, initially at the E.U. level.<sup>228</sup>

### **Advance Pricing Agreements (APAs) and transfer pricing**

An advance pricing agreement (APA) is an advance agreement on transfer pricing methodologies entered into between a multinational taxpayer and at least one government's tax administration.<sup>229</sup> In the case of the United States, an APA is essentially a contract with the Internal Revenue Service (IRS) which sets forth a methodology for evaluating whether transfer prices are arms length and will, therefore, be respected by the IRS. The heart of the APA request is the proposed transfer pricing method. This is the method the taxpayer proposes to determine an arm's length pricing that is consistent with the legislative requirements.<sup>230</sup>

Importantly, an APA is an agreement by the interested parties (related taxpayers and tax authorities) in usually at least two different countries, which commits both sides to a particular transfer pricing methodology. It assures that, barring unforeseen circumstances or a misrepresentation of the facts, the tax authorities will not subsequently challenge the positions taken.<sup>231</sup>

APAs can be unilateral, bilateral or multilateral. Only bilateral and multilateral APAs (where two or more countries are involved) can provide legal certainty as to how the tax authorities of countries involved consider the taxpayer-specific application of a transfer pricing method.<sup>232</sup> In the case of a bilateral or multilateral APA, a second agreement is made between the competent authorities of countries which are affected by the covered transaction. This second agreement is normally based on the mutual agreement provision of tax treaties between the jurisdictions.

Several complicating factors arise when there are unilaterally issued APAs, namely on what basis, under what requirements, and with what effect APAs can be requested and issued. In this respect, it is necessary to differentiate between an APA issued

---

<sup>228</sup> *Id.* at 499.

<sup>229</sup> Kenneth W. Gideon, Bryan Stone, Robert B Stack and David J Charles, *Advance Pricing Agreements*, 8 INT'L TAX REV. 9 (1996).

<sup>230</sup> *Id.* at 10.

<sup>231</sup> See Frans W. Blok, *The Netherlands*, 9 INT'L TAX REV. 53 (1997).

<sup>232</sup> See Alexander Voegele and Markus Brem, *Do APAs prevent disputes?* 14 INT'L TAX REV. 35 (2002/3).

“unilaterally” by one tax authorities or through bilateral cooperation with foreign tax authorities.<sup>233</sup>

A further complicating factor with APAs generally is the discrepancy between business-world transfer pricing and tax-world transfer pricing. Business-world transfer pricing is a multi-entity issue where many routine and non-routine functions are performed in several jurisdictions along the value chain of the multinational. Tax-world transfer pricing in the form of the OECD Model Tax Convention,<sup>234</sup> the OECD Transfer Pricing Guidelines,<sup>235</sup> and the country-specific treaties and regulations is based on a simplified concept where two controlled entities exchange goods or services between two countries.

Durst<sup>236</sup> argues that APAs are useful primarily for taxpayers with transfer pricing issues that already have come to the attention of government authorities, or are very likely to do so in the future. APAs are also useful for taxpayers with a special need for financial statement certainty. Because APAs can offer revenue authorities savings as well as taxpayers, some countries have been particularly keen to grant APAs in the

The major components of a request for an APA in the United States are<sup>241</sup>:







- d) *Reduced negotiating time.* Bilateral treaties take a year or more to negotiate. A multilateral treaty offers the prospect of avoiding the need for separate negotiations with each country. This advantage is of particular importance to small countries that do not have an abundance of resources.
- e) *Reduced treaty shopping.* A multilateral treaty would provide for uniform treatment of all residents of the participating states. Treaty shopping to get the best deal among the applicable treaties would be eliminated. Of course, the problem of persons from non-treaty states improperly obtaining benefits would not be solved merely by having a multilateral treaty.

Some of the possible disadvantages of a multilateral treaty are<sup>252</sup>:

- a) *Special provisions*

A consensus approach is desirable, and further discussion and debate over a mutual tax policy process is worthwhile and should be productive.<sup>254</sup> The best-fit response recommended by this study is that a consistent policy setting approach will be conducive to a more equitable and efficient outcome in both absolute and relative terms, along with satisfying many of the other key principles of evaluating tax policy.<sup>255</sup>

In particular, my proposed international agreement could be extended beyond binding rulings and APAs to encompass an agreed process for ascertaining jurisdiction and allocation of revenue (possibly even incorporating a variation on the formulary apportionment concept and unitary taxation with respect to multinational enterprises), as well as a limited consensus on maintaining the essential characteristics of income

sovereignty in this globalised environment, although economic theory would suggest complete harmonisation of base and rates









cooperation, competition<sup>291</sup> or (complete) harmonisation is appropriate.<sup>292</sup> The second concerns whether an international agreement to maintain or raise taxes, and allocation of the jurisdiction (or the right to tax certain income or consumption), should be developed.<sup>293</sup> The context for establishing such agreements is normally applied by commentators to income tax (for both corporations and to a lesser degree, highly mobile and skilled individuals with significant international income derived beyond their country of residence), and to consumption taxes (in particular, the value-added tax and goods and services tax).<sup>294</sup>

Part of the motivation for this study is to investigate my *a priori* contention that a mutual tax policy setting, enforcement and dispute resolution process is both desirable and feasible in the current political and bureaucratic environment, and further, to determine the conditions conducive to facilitating such a process. The level of integration of policy,<sup>295</sup> including the harmonisation versus competition of tax policy debate, needs to be analysed.<sup>296</sup> Specific examples of types of taxation which are candidates for integration of policies are income tax levied on corporations<sup>297</sup> and individuals, and consumption taxes. While there are suggestions by some commentators that the United States income tax could be replaced by some form of a consumption tax, for the purposes of this study it is assumed that the income tax will continue in the United States and in all OECD member countries, along with the majority of developing and transition nations.<sup>298</sup> For this study the focus is narrowed to consider the related areas of binding rulings and advanced pricing agreements relating to issues of income tax.

---

<sup>291</sup> The OECD has been responsive to dealing with what is considered to be “harmful competition”; see OECD, *supra* note 5.

<sup>292</sup> For a discussion on the relative merits of harmonisation and competition, see Hans-Werner Sinn, *Tax Harmonization and Tax Competition in Europe*, 34 EUR. ECON. REV. 489 (1990).

<sup>293</sup> Agreements to maintain, raise or lower taxes will necessarily have greater restrictions in scope and

### **Developing an international (world) tax organization, The United Nations' proposal**

The most recent and probably first non-academic discussion suggesting an International Tax Organisation (ITO) was that mooted by a panel of independent financial experts appointed by U.N. Secretary-General Kofi Annan and chaired by former Mexican President Ernesto Zedillo in 2001.<sup>299</sup> The proposal was to create an International Tax Organisation (ITO) that would be administered by the U.N. In essence this organisation would help nations collect and disseminate information on tax policies and, opponents insist, assess its own taxes, help governments' tax emigrant citizens working in other countries and even compel member states to share tax data. The ITO would be perceived as potentially taking a leading role in restraining tax competition which is designed to attract MNEs.<sup>300</sup>

Specifically, in their June 2001 report, presented as independent input to intergovernmental discussions, the Zedillo panel suggested that serious consideration be given to developing this new organisation.<sup>301</sup> The ITO might take on functions that would include offering technical assistance, providing a forum for the development of international tax norms, maintaining surveillance of tax developments in a manner similar to IMF review of national macroeconomic policies, restraining unwise tax competition designed to attract multinationals and arbitrating international disputes on tax matters.<sup>302</sup> It was also suggested by panel members that such an organisation might look into securing international agreement on a formula for unitary taxation of multinationals,<sup>303</sup> as well as the establishment of principals for equitable collection of taxes from emigrants. However, this proposal was put to the Preparatory Committee, where it did not find favour as being implementable in the near future.<sup>304</sup>

In a briefing note from the University of Barcelona's Observatory of Globalisation (UBOG),<sup>305</sup> it is observed that at the very least, an organisation such as the ITO could compile statistics, identify trends and problems, present reports, offer technical assistance, and provide a forum for the exchange of ideas and the development of norms for tax policy and tax administration. It could engage in surveillance of tax developments in the same way that the IMF maintains surveillance of macroeconomic policies.

Going further, the UBOG<sup>306</sup> contends that the ITO might engage in negotiations with tax havens to persuade them to desist from harmful tax competition. Similarly, it could take a lead role in restraining the tax competition designed to attract multinationals -competition that, as noted earlier in this paper, often results in the lion's share of the benefits of FDI accruing to the foreign investor. Slightly more ambitiously, an ITO might develop procedures for arbitration when frictions develop

---

<sup>299</sup> United Nations, *Media Kit: Halting a Global Tax*, available at: <http://www.un.org/esa/ffd/ffdconf/article89.htm> (visited 17 February 2004).

<sup>300</sup> See CATO INSTITUTE, *CATO HANDBOOK FOR CONGRESS, POLICY RECOMMENDATIONS FOR THE 108<sup>TH</sup> CONGRESS*, Washington DC, (2002).

<sup>301</sup> See United Nations, *supra* n 299.

<sup>302</sup> A considerable amount of this activity is already undertaken by the OECD.

<sup>303</sup> Reference to the debate on unitary taxation through some form of formulary apportionment is a very emotive and controversial area quite apart from an ITO.

<sup>304</sup> See United Nations, *supra* n 299.

<sup>305</sup> Observatory of Globalisation of the University of Barcelona, *Briefing Notes; Chapter 4: An International Tax Organisation* (2003), available at: <http://www.ub.es/obsglob/itogen2.html>, (visited 17 February 2004).

<sup>306</sup> *Id.*

between countries on tax questions. Even more ambitiously, the UBOG suggests that it could sponsor a mechanism for multilateral sharing of tax information, like that already in place within the OECD, so as to curb the scope for evasion of taxes on investment income earned abroad. Perhaps most ambitious of all, argues the UBOG, it might in due course seek to develop and secure international agreement on a formula for the unitary taxation of multinationals. Another task that might fall to an ITO would be the development, negotiation, and operation of international arrangements for the taxation of emigrants.<sup>307</sup>

If an ITO were successful in curbing tax evasion and tax competition, there would be two consequences, in the UBOG's view.<sup>308</sup> One would be an increase in the proportion of a given volume of taxes paid by dishonest taxpayers and by mobile factors of production (like capital). Most people would consider this an unambiguous gain. The other would be an increase in tax revenue for a given tax rate. Governments could take advantage of the increased revenue by increasing public expenditure, improving the fiscal balance, or cutting tax rates. The latitude to increase public spending would be welcomed by some but deplored by others, who may for that reason oppose the proposal.<sup>309</sup>

However, this proposal is unlikely to make any significant progress for some time, since it has been the subject of considerable criticism.<sup>310</sup> For instance the proposal is seen as creating something of an international tax cartel that would keep world taxes high.<sup>311</sup>

#### **Scholarly contributions to the processes for developing an international tax organisation**

Avi-Yonah,<sup>312</sup> in his examination of globalisation and tax competition, observes that relying on the OECD to restrict tax competition ultimately suffers from two significant drawbacks. First, it can be envisaged that in the longer run significant markets for both portfolio investment and retail sales will develop outside the OECD. When this situation arises, solutions that rely on OECD enforcement will lose their effectiveness unless those emerging markets were to join the OECD. While several developing countries have joined the OECD recently (for example, Czech Republic, Hungary, Korea (Republic of), Mexico and the Slovak Republic), Avi-Yonah finds it difficult to imagine China or India doing so in the near future.

Secondly, and more importantly, Avi-Yonah contends that relying on the OECD to implement solutions to the tax competition problem, even if those solutions are tailored to benefit developing countries, may not be acceptable to those countries.<sup>313</sup> He supports this view by observing that the effort by the OECD to develop a multilateral agreement on investments (MAI)<sup>314</sup> foundered precisely because developing countries and "left-leaning" non-governmental organisations coordinated a

campaign against it as representing the interests of the rich countries and “their” MNEs.

Avi-Yonah’s proposal for restricting tax competition is via a multilateral body that includes developing countries. While no such body currently exists, he acknowledges that several scholars have already proposed setting one up.<sup>315</sup> However, in Avi-Yonah’s view, there is a natural candidate for the job which already is in place: the World Trade Organisation (WTO).<sup>316</sup>

The WTO, argues Avi-Yonah, is the natural candidate to be the “World Tax Organisation.” In fact, he argues that it is hard to see how the WTO can fulfil its role of ensuring the free flow of trade and reducing non-tariff barriers without having jurisdiction over tax matters. In addition, the fact that the WTO includes representatives from almost all the developing countries gives it an obvious advantage over the OECD even if the solutions it implements are exactly the same as the OECD-based ones proposed above.<sup>317</sup>

Avi-Yonah observes that there are several serious objections to including tax matters in the jurisdiction of the WTO. First, it has been argued that the WTO lacks sufficient tax expertise.<sup>318</sup> However, that problem, argues Avi-Yonah, can be remedied by hiring a sufficient number of tax experts to sit on the WTO’s panels. In fact, as the WTO has expanded its jurisdiction to non-tariff matters, its staff already includes tax experts who also understand trade issues.<sup>319</sup>

Green has advanced a more serious objection arguing that the costs of imposing the WTO’s legalistic dispute-resolution mechanism outweigh any benefits.<sup>320</sup> Green argues that the need for the WTO to

r.0007 Tc0.3012rtsr. hhashs theiWTO. Firte-resol-18.1475 -1[(r5 TD0.0007 Tc1.105



than the alternative of going it alone. Also, countries with different political agendas will find it difficult to agree on a given tax structure. Even in the restricted area of the E.U. the progress towards tax harmonisation has been limited, although improving with time. Tanzi observes that the experience with negotiating tax treaties indicates that tax agreements, even between two countries, are, at times, difficult to reach and are very demanding in time and effort. In any case there is no institutional set-up that facilitates the discussion of issues and the negotiation of agreements on a world basis, and this situation lies at the heart of the problem.<sup>330</sup>

This situation leaves the alternative of creating an international organisation which would systematically deal with tax matters or alternatively, of giving a specific mandate to an existing institution. As has been noted previously, there is a world organisation that deals with trade matters (WTO); one that deals with macroeconomic stability and balance of payment equilibrium (International Monetary Fund - IMF); one that deals with economic development (International Bank for Reconstruction and Development - IBRD); and many others that deal with other objectives. The IMF, in particular, focuses on transnational implications of domestic macroeconomic policies. Yet, there is no organisation at the world level that supervises, or attempts to influence, tax developments with transnational implications.<sup>331</sup>

Tanzi<sup>332</sup> suggests that this situation can be considered unusual because countries are

Tanzi then refers to James Tobin's idea of an international tax on cross-countries' financial transactions, an idea that has been adopted by other writers who have proposed international taxes on bases such as airline tickets, financial transactions, or other bases, to finance the U.N.<sup>336</sup> The collection of such a tax or some version of it, could be assigned to the World Tax Organisation, in Tanzi's view.<sup>337</sup>

However, Tanzi recognises that it is unlikely that the countries of the world are ready for such a step or for similar steps even though such taxes could provide financing for the activities of some of the international organisations and would remove the decision to finance established institutions such as the U.N. from the frequent political debate within countries.<sup>338</sup> Nevertheless, Tanzi suggests that the World Tax Organisation could be given responsibilities other than tax collection, with some of the main activities of such an organisation being<sup>339</sup>:

- 1) The identification of main tax trends and problems at the international level.
- 2) The compilation and/or generation of relevant tax statistics and tax information for as many countries as possible.
- 3) On the basis of the above information, preparing a (yearly?) *World Tax Development Report* presenting statistics, describing main trends (both statistical and in terms of policy developments), identifying problems, and, perhaps, pointing toward feasible solutions to these problems. Countries' best practices could be identified and made known to other countries. Emerging problems could be highlighted and solutions to them could be studied.
- 4) Providing some technical assistance to countries in tax policy and tax administration always keeping in mind that changes recommended should make the tax system of the country receiving the assistance better coordinated or harmonised with the systems of other countries. Furthermore, the goal of the technical assistance provided by the new organisation would be to make the tax systems more compatible.

- 1)  
84) Providing surveillance of the

Thus, Tanzi concludes that the World Tax Organisation would identify tax developments that create cross-national spillover effects and would bring these to the attention of a board of directors representing all the countries.<sup>340</sup> The board would recommend changes in those areas where the tax behaviour of a country has clearly negative implications for other countries. For example, it would recommend changes in countries that are obviously raiding the world tax base. This organisation would not get involved in tax issues that do not have significant cross-border spillovers. Furthermore, the World Tax Organisation would only recommend changes and not force them. While these would be the major activities of such an organisation, Tanzi recognises that more detailed and specific terms of reference might include other activities.<sup>341</sup>

Do we need an International (or World) Tax Organisation? Horner<sup>342</sup> argues that a new global institution in taxation policy will make a significant, non-redundant contribution to global governance if - and only if - it gives a full and true voice to the fiscal concerns and needs of developing countries. That objective cannot be realised with a one-dimensional focus on tax cooperation. For the developing countries of the world, taxation policy and the development agenda are inseparable.<sup>343</sup>

In Horner's view, the U.N. seems to be the best contender for the job of convening an international tax body, and it is clearly positioning itself to become globally what the OECD has become for its interest group. The U.N.'s International Tax Organisation (ITO) proposal<sup>344</sup> is a commitment by heads of state to "[e]xplore, including through a global network of tax authorities, the potential benefits and optimal design of an International Tax Organization or other tax cooperation forum, taking into account previous efforts in this regard as well as the special needs of developing countries and countries with economies in transition."<sup>345</sup> It also underscores the need for "strengthening the representation and participation of developing countries in all global economic decision making and norm setting bodies. . . ."<sup>346</sup> If these ambitions can be realised, the ITO will have an excellent basis for success and a legitimate claim that the new international tax body is not redundant.

Horner then presents several conditions which are considered vital for an international cooperation agreement, this being a necessary component for an effective ITO<sup>347</sup>:

- 1) *Condition One: No Gag Rules:* All issues must be eligible for discussion at the forum;
- 2) *Condition Two: Fair Share:* Attention should be given to profit allocation rules;
- 3) *Condition Three: Link to Official Development Assistance:* Development issues should be relevant in formulating tax policy;
- 4) *Condition Four: Tax Administration Efficiency:* Developed countries should assist developing countries in improving tax administration; and

---

<sup>340</sup> *Id.* at 343.

<sup>341</sup> See the companion paper by Tanzi; Tanzi, *supra* n 64.

<sup>342</sup> Frances M. Horner, *Do we need an International Tax Organisation?*, 24 TAX NOTES INT'L 179 (2001).

<sup>343</sup> *Id.* at 179.

<sup>344</sup> United Nations, *supra* n 299.

<sup>345</sup> Horner, *supra* n 342, at 188.

<sup>346</sup> Draft Outcome Prepared by the FfD Facilitator (September 2001) para 54, available at: [http://www.un.org/esa/ffd/0901/Facilitator\\_text.htm](http://www.un.org/esa/ffd/0901/Facilitator_text.htm). (Visited 17 February 2004).

<sup>347</sup> See Horner, *supra* n 342, at 192-4.



- 5) *Condition Five: Governance:* Developing countries should have a meaningful voice in any world tax body or tax cooperation arrangement.

**A previously suggested application of a world tax organisation model: The cyber-entity**

The literature to date is scant on specific areas that a World Tax Organisation/International Tax Organisation (ITO) could be applied to. One area that has received some attention is that of electronic commerce policy and its ensuing taxation implications. One proposal has been offered by Oats and Fernandez,<sup>348</sup>

have guessed what the internet itself would have looked like only 5 or 10 years ago. Anything is possible.

**Approaches for progressing towards a World Tax Organisation**

Two scholars have made inroads into the possible structure of some form of international tax organisation. Their proposals are discussed in turn.

**Thuronyi**

Thuronyi argues in favour of international tax cooperation, a multilateral treaty, and

- 5) Finally, derogations and transitional arrangements would provide a bridge between the existing treaty networks and part one of the agreement. There would also be a common text based on the OECD Model, a unilateral version of the common text, general and undertakings.

Finally Thuronyi presents his proposal for the structure of an international

transactions.<sup>365</sup> Its staff should conduct studies, including statistical studies, on how the system is working, and propose solutions.

The organisation should, in Thuronyi's view,<sup>366</sup> have the power to issue interpretations of the treaty that would have general legal effect (specific disputes would have to be resolved separately). This would be an important improvement over the existing situation with the OECD commentary, because the interpretation would be legally binding. The organisation would provide a forum for continuous review of experience with the treaty. It would encourage the renegotiation of existing agreements to bring them into line with the treaty, including serving as a forum for multilateral negotiations (a country could renegotiate simultaneously a set of existing treaties with other countries). It would deal with problems of interpretation and application of the treaty and would attempt to find solutions by way of issuing reports, issuing formal interpretations of the treaty, and proposing amendments to the treaty text for ratification by the members.

While the primary focus of the organisation would be, in Thuronyi's view,<sup>367</sup> to facilitate the *operation of the international tax system*, it should also deal more broadly with taxation, including some purely domestic issues. On purely domestic taxation, however, the organisation should be more of an observer and technical advisor rather than interfering in countries' decisions on tax policy and thereby impinging on their sovereignty. The organisation should gather information on how the tax systems of its member countries operate, including data of a statistical, economic, and legal nature. It should provide technical assistance to its member countries upon request.

The organisation should, argues Thuronyi,<sup>368</sup> become a leader in comparative tax law

Thuronyi then contends that the process of negotiating a unified tax treaty template would presumably encourage countries to rationalise their bilateral treaty relationships and therefore to minimise the amount of derogation.



and effective coordinating mechanism to determine future tax policy in an increasingly globalised world. With the rapid integration of world economies, combined with the transnational activities of global businesses, in Pinto's view a World Tax Organisation may in the not too distant future be a necessary, rather than a desirable, foundation of international tax policy. Thus it is a question of when rather than if, such an organisation becomes a reality.

#### **BINDING RULINGS AND APAS IN A WORLD TAX ORGANISATION: PART OF A GRADUATED APPROACH?**

The approaches to a transition from the current predominantly nationally-focussed tax policy approach to my proposed new internationally-focussed best-fit response need to be considered. In arriving at a best-fit response (ultimately, in my view, a multilateral agreement on developing tax policy, including allocation of taxes, jurisdiction determination and a general commitment with regard to maintaining existing taxes is needed, but for the purposes of this study this is restricted to binding rulings and APAs as a first step), the transition process from the current environment to one that fully recognises globalisation's impact on tax policy is vital. Frequently, this process is neglected or left to lawyers and other officials to develop after the new policy is finalised.<sup>385</sup> Various options to arriving at a best-fit response include gradualism (which implies some form of dual system) and going "cold-turkey". Concurrent with ascertaining the most prudent approach for implementing a new policy process, the cost/benefit considerations must be considered.

A further option is to implement changes on a regional (as opposed to global) scale in coordinating international tax policy, such as in the E.U.<sup>386</sup> One scholar has suggested that a suitable test case, in the context of a multilateral tax treaty, could be the APEC nations.<sup>387</sup> In this paper I pursue the international application of a mutual tax policy setting and development process for a particular issue (binding rulings and APAs) rather than tax policy in wider terms on a regional basis.

While a greater level of harmonisation from a regional perspective is a desirable (and achievable) goal,<sup>388</sup> widespread application via extensive ratification<sup>389</sup> is crucial in an environment of globalisation. Nevertheless, international tax policy may not be fully recognisable until after draft legislation (or a draft policy process) is prepared and

developing an international tax organisation, following the approach suggested in the earlier discussion.

### **CONCLUDING OBSERVATIONS**

This paper, like that of Pinto<sup>391</sup> and Thuronyi,<sup>392</sup> focuses on the policy rather than the detailed operational issues of a World Tax Organisation. However, this paper extends upon Pinto<sup>393</sup> through suggesting an area that a WTO would be a positive development, namely binding rulings and APAs with cross-border effects. Furthermore, the approach proposed in this paper largely endorses that proffered by Thuronyi.<sup>394</sup>

With respect to binding rulings and APAs, multilateral agreements are far superior to unilateral or even a series of bilateral agreements. Administering such an agreement would be greatly facilitated by an international organisation, such as the World Tax Organisation that has been proposed in this paper. Furthermore, binding rulings and APAs would, in my view, be a less contentious subject area for sufficient nations to relent a degree of their tax policy sovereignty to a suitably developed and organised international body. However, a greater degree of harmonisation of APA processes, and more particularly binding rulings regimes, is needed to facilitate any form of international cooperation in this area.<sup>395</sup> This in itself would represent a significant achievement as a first step. Thus to answer the question posed in the title to this paper, an International or World Tax Organisation would be an appropriate forum for administering binding rulings and APAs.

However, should such an organisation be considered desirable by a large number of nations, then further work and research will need to be conducted in many areas, including the need to take a closer look at the detailed structure of the World Tax Organisation model, the need to undertake further investigation in relation to the possible obstacles of establishing a World Tax Organisation, and finally, consideration will need to be given to the development of a potential framework towards developing a workable World Tax Organisation. These issues form part of my on-going research.