THE THEORIES OF THE STATE AND THE INTERNATIONALISATION OF THE STATE AS A FRAMEWORK FOR THE DISCUSSIONS ON INTERNATIONAL TAXATION

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ABSTRACT

The reproduction of global capital requires the construction of supranational legality, an internationalisation of the State. Furthermore, the participation of States in this world system is characterized by competition among States to attract capital, with tax incentives playing a central role. The discussion on the theories of the State can then serve as a framework to understand current discussions on international taxation. Since 1991, Picciotto has been proposing - with a growing movement of followers in the academic faculty and/or civil society - unitary taxation as an alternative to the arm's length principle that has been transposed into most national tax regulations since the beginning of the 20th century. Such proposal arose at a time of intersection between his contributions to the discussions on the theories of the internationalisation of the State and his first study on international business taxation. Following several other OECD proposals from 1998 onwards, in 2018, the G20/OECD's Inclusive Framework on BEPS proposed a unified solution to tax the digital economy, along with a proposal to combat base erosion of the taxable income and the transfer of profits. Both proposals are based, conceptually, on the principle of unitary taxation. This article discusses the challenges of international taxation within the framework of the debate on the internationalisation of the State. Both ends of this discussion draw heavily on Picciotto's academic work.

1. INTRODUCTION

A significant increase in international financial relations has characterised the last 50 years. The current financial globalisation is characterised by a gradual disconnection between financial flows and production (Viegas, 2019).

In this process of financial globalisation, low or zero-tax jurisdictions, offshore financial centres, some of which are very large, developed, central countries, play a central role. As noted by García-Bernardo et al., five countries (The Netherlands, the United Kingdom, Ireland, Singapore and Switzerland)[1], canalise most of the corporate offshore investment as conduit offshore financial centres officiating as intermediate destinations in the route of international investment (Garcia-Bernardo, Fichtner, Takes, & Heemskerk, 2017).

In this context, it is not surprising that the effective rate of companies belonging to multinational enterprise groups is, on average, between 4% and 8.5% lower than that of companies that do not belong to multinational groups; large multinational groups use different tax regulations and preferential regimes to their advantage (Johansson, Bieltvedt Skeie, Sorbe, & Menon, 2017).

Different studies show different estimates on the size of intrafirm trade, locating the percentage of intra-firm trade between 30% and 80% of total trade (Verma, 2023, págs. 140-141). Multinational entities (MNEs) have reduced their labour, energy or transportation costs by internationalising their activities.

Since 1980, foreign direct investment (FDI) has grown significantly internationally, both through direct investment and the formation of fixed capital and through large movements of mergers and acquisitions (Viegas, 2019). Moreover, FDI has undergone transformations. Incoming and outgoing FDI, attracted by tax exemptions to certain types of companies or operations, has multiplied exponentially in some countries. What possible connection to real economic activity can the inflow of FDI worth more than 5,000 times its Gross Domestic Product (GDP) have in Luxembourg? Or an outflow of FDI of more than 3,000 times its GDP? (Damgaard & Elkjaer, 2017).

MNEs are structured in such a way that they centralise the assets, functions and risks in certain subsidiaries, or as some have come to characterise it, through outsourcing of outsourcing (Grondona V. , 2014). The digitisation of the economy has boosted this way of structuring MNEs.

This centralisation of assets, functions and risks is often done by locating the profits in subsidiaries with no economic substance and low or null corporate taxation. They do not have employees, sometimes do not have an office, and when they do, they have a return per employee that exceeds any expectation imagined by any economist. That is, they serve as a facade to obtain a tax advantage, a strategy used by MNEs of all origins.[2]

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[1] The Netherlands, the United Kingdom, Ireland, Singapore and Switzerland are rated by the Corporate Tax Haven Index elaborated by Tax Justice Network in the 4th, 13th, 11th, 9th and 5th position due to both the global scale weight they represent and their scoring as corporate tax havens (See https://cthi.taxjustice.net/en).

[2] This assertion is backed up by a number of notorious, publicly-known cases that recently have received considerable international attention due to the Panama Papers, the Pandora Papers and the Luxembourg Leaks. Moreover, as Verma has very well recollected, several studies analysing MNEs from US, German,

Moreover, the purchase of raw materials can be centralised in a subsidiary, supplier management in another subsidiary, logistics, financing, marketing and patents, are located contractually -not always in reality- in certain subsidiaries. For example, in the case of Argentina, based on information from the Country by Country Reports (CbCs), in some cases, the subsidiaries of MNEs that have a physical presence in Argentina, which have less than 1% of the Group's employees, nevertheless declare more than 70% of the Group's profits, in jurisdictions where they pay an effective rate of income tax of less than 5% (Grondona V. , 2021).

How do multinational corporate groups achieve this tax avoidance? Through the valuation of intragroup operations. It is through the valuation of export and import operations, payment of services, financial operations, and payment of royalties whose utility, subject to tax, can be located in one jurisdiction or another. Considering the relevance of intra-firm trade allows us to understand the magnitude of the problem that involves the valuation of these intra-group operations carried out between different jurisdictions.

For this reason, and considering that the reproduction of global capital requires the construction of supranational legality, some sort of internationalisation of the State (Míguez, 2017), an exponential growth of regulatory co-operation networks is observed, both at the supranational and subnational levels (Picciotto S. , 2011, pág. 88). This increased international co-operation has resulted both in an exponential growth of international tax treaties and an increased role of technical organisations, dominated by experts from the industry who work on the creation of international standards intended to be applied by national States. In relation to international taxation, the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) Committee of Experts on International Co-operation in Tax Matters, the Platform for Collaboration in International Taxation, the African Tax Administrations Forum, the Inter-American Centre of Tax Administrations (CIAT), and the South Centre, among others, are some of such technical bodies that either design detailed rules in relation to international taxation, or contribute to the discussion, from different positions of power, taking positions closer or further away from national States', but also more or less influenced by internationalised capital.

Since 2018, the G20/OECD Inclusive Framework (IF) on Base Erosion and Profit Shifting (BEPS) has been working on a unified proposal to tax the digital economy, as well as a proposal to combat BEPS. The origins of this proposal can be traced back to the G20/OECD's BEPS Action Plan of 2013-2015[3] and further back to the OECD's 1998 report on Harmful Tax Competition (OECD, 1998).

The IF's Unified Approach - the "Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy"- initially aimed at taxing MNEs where their activities take place, considering unitary taxation and proposals for apportionment, after years of rejecting even the possibility of expanding the use of the profit split method

Czech, French, among others, have found either a disproportionate allocation of profit in tax havens, or significant profit shifting to tax havens through transfer pricing (2023, pág. 142)

[3] See https://www.oecd.org/tax/beps/

(PSM), one of the five methods included in the OECD Transfer Pricing (TP) Guidelines[4] (OECD, 1995), a formulary apportionment method framed as transactional profit method[5].

The Global Anti-Base Erosion Model Rules (GLoBE, or Pillar 2) of the Unified Approach – a top-up tax to be applied by countries deciding to implement it[6], in relation to those jurisdictions where MNEs are taxed at a rate lower than the 15% minimum- is also conceptually close to the unitary taxation approach.

Even though the final outcome of the discussions on the Two Pillar Solution is still pending, and the results have not been favourable for developing countries, the fact that the discussion considers treating MNEs as unitary firms is meaningful.

Picciotto has been proposing, at least since 1991, together with other academics such as Reuven Avi-Yonah, and following other previous authors, such as Peggy Musgrave since1972, unitary taxation with formulary apportionment as an alternative to the arm's length principle (ALP) - which has been used since the beginning of the 20th century - (Picciotto S. , 1992) (Picciotto S. , 1991). The ALP consists of analysing transactions among related parties as if they had occurred between independent ones.

The discussion on the theories of the State can serve as a framework for understanding current discussions on international taxation. The following sections present some brief comments related to the theories of the State and the internationalisation of the State; the problems for taxation in a growing internationalisation of capital and the solutions proposed in the international framework -and the growing influence, among these, of proposals for unitary taxation-.

2. THE INTERNATIONALISATION OF THE STATE IN THE CONTEXT OF INTERNATIONAL TAXATION

The 20th century has seen exponential growth in the internationalisation of capital, particularly after the Second World War, and even more so after the onset of financialisaton in the 1970s.

The globalisation of capital is expressed in the liberalisation of markets, money and capital, as well as in the internationalisation of production through MNEs. Increasingly, international financial and economic transactions cannot be easily defined as taking place in a specific territory. They are either taking place simultaneously through multinational collaboration between entities located in different countries (e.g. in research projects) (Grondona V. ,

[4] OECD's 1995 Transfer Pricing Guidelines have been modified in 2009, 2010, 2017 and 2022. However, the five transfer pricing methods remain substantially the same.

[5] Transfer pricing methods listed in the OECD Transfer Pricing Guidelines since 1995 and up to date, and incorporated into local legislation in most countries, amount to five which are separated into two groups of methods: Traditional Transaction Methods including Comparable Uncontrolled Price method (CUP), Resale Price Method (RPM) and Cost Plus Method (CPM); and Transactional Profit Methods including Transactional Net Margin Method (TNMM) and Profit Split (OECD, 1995). There is a 'sixth method' –not recognized as a method by the OECD, but rather as a benchmarking methodology within the CUP method- for the valuation of commodity exports which was originally created by Argentina, and subsequently incorporated to the legislation of several commodity export countries such as Uruguay, Zambia, Ukraine, Brazil, etc. (Grondona V. , 2019).

[6] For a list of countries intending to implement Pillar 2 see https://tax.thomsonreuters.com/blog/what-are-countries-doing-to-implement-oecds-beps-pillar-2-0/

2014); or located for tax residence purposes in one country while having an economic activity (e.g. through sales) in other countries. [7]

This leads to conflicts and overlaps because more than one State is involved in an MNE. In tax matters, there is an overlap in the jurisdictions' taxing rights and gaps, usually due to tax incentives or rules created to attract such mobile, global capital. MNEs can have an economic activity in a country in which they do not have a physical presence –and thus, a taxable presence-, and can have a taxable residence in a jurisdiction in which they do not carry out any activity.

The "fragmentation of the international system", in the context of internationalisation and globalisation, implies the loss of national States as an element of monopolistic domination over a territorial space (Alvater, 1999, pág. 84). This does not mean that there is a disappearance of national States, but rather a reduction in their margin of intervention, since the liberalisation of the capital flows, products and services place national policies under the dynamics of multinational conglomerates (Hirsch, 1999, pág. 72).

Picciotto, however, considered the principle of territoriality to be the cornerstone of the international system based on Nation-States, observing the world system not as an aggregation of compartmentalised societies and States, but rather as a single system in which State power was allocated between territorial entities, being jurisdictions in practice interlocking in a network (Picciotto S. , 1991, pág. 215). Moreover, Picciotto rightly points out that the removal of economic barriers has not resulted in a 'unified free world market' but rather has revealed a *'...landscape of diverse national and local regulations'*, which has resulted in a need for networks of regulatory co-operation (2011, pág. 88)

Hirsh, for his part, also observes that the emergence of MNEs, in the context of this internationalisation of capital, does not imply that the system of national States has been transcended since these remain inherently linked in different ways (2005).

There is an internationalisation of the State intrinsically linked to national States. This internationalisation of the State has taken different forms within the taxation framework of transnationalised capital. On the one hand, most countries have extended the application of their tax legislation outside their territory. For example, countries applying the World Taxation System to tax both their residents and non-residents who generate income or have assets in the territory. Control Foreign Companies (CFCs) are also a practical example of the extension of national legislation and application of the global system. Another example constitutes withholding taxes applied at source for payments made abroad based on a presumption of local profit.

The Foreign Account Tax Compliance Act (FATCA) and the Global Low Rate Intangible Income (GILTI), both from the US, can also be cited. The first of these laws, FATCA, imposes a penalty rate on those financial institutions that do not send information about American citizens who have financial accounts in other countries. The second consists of a minimum rate that companies resident in the US must pay when they have subsidiaries that have been taxed below a minimum in other jurisdictions.

[7] The latter being the underlying problem targeted by Pillar 1. Amount A of Pillar 1 aims at creating a new nexus for taxation by allocating taxable income to market jurisdictions (Grondona V. , 2021).

Other examples could be those of countries applying unilateral measures for the taxation of the digital economy: by 2022, Costa Rica, Greece, Kenya, Zimbabwe, Slovakia, India, Mexico, Pakistan, Paraguay, Peru, Taiwan, Turkey, Uruguay and had applied withholding taxes under a presumption of rent generated locally by digitalised firms; India, Israel and Nigeria had extended their PE definition to consider a significant digital presence; and India had enabled the use of a fractional apportionment in such cases (Amar & Grondona, 2022). In all cases, the regulations of any country exceeding its national borders are confronted with those of the rest of the Nation-States.

The case of FATCA is worth a separate mention. Sending information to the United States by financial entities of any country, in the absence of an international information exchange agreement between States, would violate the banking and financial secrecy that is applied to a greater or lesser extent in all countries. Furthermore, FATCA agreements are all governed under US law. Financial institutions send information to the US under FATCA even in cases where there is no intergovernmental agreement in place. In the case of FATCA, the US imposes obligations on financial institutions worldwide not only relating to the reporting of information but also withholding 30% of certain payments to other financial institutions not complying with FATCA.

Moreover, FATCA is unilateral in nature, as it is meant to make information on US taxpayers available to the Internal Revenue Service. Even where countries have signed bilateral FATCA agreements with the US in time, reciprocity is not fully applied (e.g. while the US receives information on account balance and movements, its partners receive information on account movements only). (Garbarino, 2018).

On the other hand, it is interesting to note that what was initially a US initiative, such as FATCA, was re-invented as an initiative of the OECD's Global Forum for transparency and the Exchange of Information (EOI) for tax purposes (the Global Forum) for the automatic Exchange of financial information –based on the Common Reporting Standards (CRS)- under the framework of the Convention on Mutual Administrative Assistance in Tax Matters (CAAM) in 2014. While, the US GILTI proposal constitutes the basis on which Pillar 2 or Global Anti-Erosion Rules of the Tax Base (GloBE) is built.

Furthermore, the TP methods for the valuation of international operations that were incorporated into the OECD TP Guides of 1995 (OECD, 1995), arise after a first initiative, in 1978, of the OECD to reproduce on an international scale the methodology developed by the US based on the ALP, which was in turn based on the outcome of the League of Nations 1928's first tax treaty model for the relief of double taxation.

The need to regulate transnational capital that exceeds national borders leads to the construction of supranational legality through international institutions that design policies and execute actions that aim to be incorporated in one way or another into the legislation and policies of national States (Míguez, 2017).

This explains that for more than 50 years, the OECD has become the intergovernmental institution that dominates the design of policies that are then incorporated into the regulations of national states.On the other hand, the impressive growth of agreements to avoid double taxation, particularly since the 1990s to today, where there are nearly 3,000 worldwide-, which aim to distribute tax rights between countries (favouring the countries of residence in the said process) (Leduc & Michielse, 2021), could be explained by this need to resolve

conflicts that arise between States in relation to the extension of their tax powers outside their national borders. They are also justified as a way to attract capital, an issue not proven in practice and are promoted by MNEs themselves to obtain an internationalisation of regulation that accompanies their interests[8]. In this sense, the reproduction of international capital is also guaranteed by national States that negotiate favourable conditions for said internationalisation.

It should be noted that, from the point of view of historical materialism, classes entail specific relations of production, and theorists of the State have arrived at different positions regarding the representation of such classes in the State.[9]

Now, in the context of the internationalisation of the State and the German derivation debates[10], from which the theories of the World System start, nation States guarantee the reproduction of capital, also in the international context. This does not imply, and this must be clear, that capital is the 'owner' of the State or that nation States represent the interests of the capitalist, but rather that they guarantee the reproduction of capital or of the relations that guarantee capital. This is also the case in the context of the internationalisation of the State.

Returning to the question of the internationalisation of the State through international agreements, it is worth observing the exponential growth of regulatory co-operation networks at the international level. One of the results of this growth in co-operation is the impressive increase in agreements for EOI for tax purposes.

International agreements can strengthen the enforcement powers of a State (Picciotto S. , 1991). This is particularly true in relation to international EOI agreements for tax purposes. For example, a country like Argentina today automatically receives information from more than 700 thousand accounts of Argentine residents abroad, thanks to which it has determined tax adjustments for 1.441 million Pesos between 2020 and 2022, in relation to taxpayers who had either not declared said accounts or had underreported their value in their tax returns. Considering the increasing internationalisation of capital referred to above, exercising the power to collect taxes would be practically impossible without this information.

Another result of international regulatory co-operation is the rise of technical organisations (public, private or hybrid) and technicality, dominated by experts working on the specification of detailed standards intended to be implemented by national States (Picciotto S. , 2011, págs. 93, 101).

In the context of international taxation of capital, one type of co-operation that takes a hybrid public-private form is achieved through Mutual Agreement Procedures concluded under Article 25 of the OECD Model Convention (or its equivalent in the UN model). Based on this article, the competent authorities and MNEs negotiate the valuation of their international operations, the transfer prices, and the taxes they will pay in each country.

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[8] Leduc and Michielse state that "[i]n the vast majority of cases involving developed-developing country relationships, treaty negotiations are initiated by developed countries" (2021, pág. 170).

[9] Marxists State theorists such as Poulantzas, Miliband and Gramsci, but also Holloway and Picciotto have asked themselves how is it that the domination of a class in the capitalist society generates the 'fantastic form' of the State, an impersonal apparatus of public power, separate from society, in appearance separate from the process of production? (Holloway & Picciotto, 1994, pág. 79) (Holloway & Picciotto, 2017, págs. 108, 116).

[10] Holloway and Picciotto (2017, pág. 83) defined the objective of the German derivation debate was to systemically derivate the State as a political form out of the capitalistic production relations.

These agreements have an ambiguous status, as they can be treated as declarations of intent by and between administrative authorities. However, they could also be understood as binding international agreements (Picciotto S. , 1992, págs. 297–299) (Picciotto S. , 2011, pág. 96). Furthermore, said article establishes the right of access to international arbitration if multinational companies consider that the issues have not been resolved. Therefore, both in these cases and in bilateral investment agreements, it *"...basically allows the private rights of a legal entity to be used to challenge the public policy decisions of government and state organisations*" (Picciotto S. , 2011, pág. 96).

An issue that is also worth highlighting in the context of the internationalisation of capital is the internationally oriented hegemonic[11] factions that have been increasingly able to influence the decisions of nation States since the 1980s. For instance, the hegemony of the internationalised capital and internationalised high net worth individuals, in a context of neoliberal hegemony, have influenced national States into removing trade barriers and capital controls, as well as participating in international tax competition through offering tax incentives.

This influence occurs through soft-law legislation, too. For example, the OECD TP Guidelines have been transposed into the regulatory framework of most countries worldwide, whether or not they are part of the OECD, and are used by national courts of justice as an interpretive guide for local regulations.

Another form of influence that international capital takes on national States occurs through the incidence of tax havens and offshore financial centres worldwide. As Palan rightly points out, the offshore world has been transforming capitalism into what it is today since *"... the boundaries between outside and inside are eroding because the principles that govern the offshore economy, such as low taxation and light regulation, have infiltrated in the state"* (2003, pág. 146). There is a proliferation of tax havens and tax incentives worldwide based on an interpretation of sovereignty as the *"...exclusive right to make law within a delineated territory."* (Palan, 2003, pág. 88).

In the context of the internationalisation of capital, Nation-States allow the extraterritorial influence of capital (through MNEs) and other States (those where MNEs are residents) by granting tax incentives to attract capital. In a way, this has been taken as a prerogative for the Global Minimum Tax (Pillar 2, or GLoBE) design by the G20/OECD's IF. Pillar 2 consists mainly of the development of the following mechanisms: a complementary tax to the parent company in relation to the income obtained by a group entity located in another jurisdiction that has been taxed below 15% (the "income inclusion rule"); and the possibility of denying deductibility or requiring an equivalent adjustment of payments made between subsidiaries provided that the jurisdiction receiving the payment does not tax the income in question or taxes it below the agreed minimum rate and to the extent that the profit of an entity is not taxed by the "income inclusion rule" (the "under-taxed payments rule").

[11] Hegemonic theories refer to a form of domination based on consensus rather than the use of Power (Míguez, 2017).

That is to say, in short, States have ceded sovereignty by introducing tax incentives, and therefore, the State of residence of the capital can now tax that profit that is not taxed in the source countries.

3. THE PROBLEMS FOR TAXATION IN AN EVER-GROWING INTERNATIONALISATION OF CAPITAL

The rapid growth in the movement of capital allows MNEs to locate capital wherever it is found to be most profitable (Volckaert, 2016, pág. 10). This represents a problem for the taxation of MNEs because of the possibility of misalignment between economic activity and the artificial apportionment of profits, the tax base. Tax planning schemes take advantage of existing taxing rules. In this way, for instance, Luxembourg, the Netherlands and Hungary provide favourable conditions for the establishment of tax-efficient cash flow conduits, while others such as the British Virgin Islands, Panama and Hong Kong provide ease of constitution of shell companies (Volckaert, 2016).

Among such rules, those relating to the valuation of intra-firm transactions are based on the ALP. Using the ALP propitiates tax avoidance through TP in a framework of 'legality'. The independent entity principle, together with the ALP, enables MNEs to arbitrate between different jurisdictions with different legislations, allocating only routine levels of profit to entities in high-tax countries while shifting profit as payments for use intangibles, services, finance and fees to low or null-taxed affiliates (Picciotto S. , 2016, págs. 7-8).

There are multiple ways to shift profits to low and null tax jurisdictions. MNEs can, and in effect, do locate actual activities in them (i.e. employment, assets, production). However, this is not always the case, as MNEs can also use legal and accounting techniques to shift profits to intermediary affiliates located in such jurisdictions, reducing their overall tax liabilities.

The network of affiliates is often strategically organised with a view of the possibilities of profit-shifting through TP. The TP mechanisms have become so relevant that MNEs have, over the years, restructured their operations in global value chains organised with tax planning objectives (Grondona V. , 2014).

Except when the PSM is applied - in its pure version, not the 'Residual Profit Split, which is a version of the PSM which is used in combination with the TNMM - the application of the ALP requires the identification of a set of comparable transactions or financial results either within the same entity with third parties or between independent entities.

In short, the application of the methodology for the definition of transfer prices falls into a conceptual entanglement riddled with argumentative flaws that end up invalidating any adjustments proposed by tax administrations, as can be seen from the results obtained in court cases throughout the world, which provide, in most cases, weak jurisprudence[12].

[12] For a revision of transfer pricing jurisprudence for the Argentine case, see Grondona and Knobel (2017).

Given that the related companies are not independent and do not behave in any way as independent entities, the allocation of income and costs, and therefore, benefits based on the "arm's length" criterion, ends up being subjective, unclear and debatable. MNEs end up taking advantage of this context to restructure their activities, fragmenting them within the economic Group and each entity in such a way as to leave smaller portions of profits in entities where they perform economic activities, which, in general, are not low or null tax jurisdictions, eroding in this way the taxable base and deviating benefits to jurisdictions through jurisdictions that act as conduits, tax havens, or have preferential tax regimes (Volckaert, 2016).

The digitalisation of the economy, combined with the possibilities provided by certain jurisdictions to define a residence for tax purposes artificially, has facilitated and even potentiated such global tax planning in what should, in effect, be considered to be, in practice, global wealth chains[13].

It has become increasingly clear that the TP methods are inadequate, as they ignore the economic reality of MNEs, the advantages of scale, and the synergy resulting from integrating their operations.

When tax administrations create areas specialising in international taxation and strengthen TP audits, additional tax revenues can result from voluntary compliance driven by a higher risk perception[14]. Tabulated below is an example of how spontaneous adjustments to the tax base have increased in Argentina after the implementation of modified regulations in 2020 that affected the presentation of TP documentation for the fiscal years 2018 onwards[15]and the strengthening of specialised international tax audit areas, risk analysis and transfer pricing audits between 2020 and 2022[16].

Table 1:Spontaneous adjustment to the tax base and income tax based on transfer pricing declarations

Fiscal years	Adjustment to the tax base (millions of Argentine pesos)	Adjustment to the tax base (millions of US Dollars)
2012	515	104.72
2013	574	88.02
2014	645	75.43

[13] Seabrooke and Wigan (2022) have developed a global wealth chain (GWC) theoretical framework based in global value chains theory. Under this framework, the value created in developing countries generates profits and wealth elsewhere, often in entities strategically located in jurisdictions that provide fiscal benefits, targeted rules and financial secrecy, through GWCs.

[14] See CIAT data on transfer pricing for data on different Latin American and Caribbean countries' transfer pricing legislation, information requirements, dedicated resources, number of tax audits and tax adjustments. Available at https://www.ciat.org/precios-transferencia/

[15] Even when transfer pricing regulations have been in place in Argentina since 1998 (Grondona & Knobel, 2017), a substantial modification to existing regulations was introduced in 2020 through General Resolution 4717, after 2017's tax reform (Law 27.430).

[16] CIAT data contains information on transfer pricing regulations and practices in Latin America and the Caribbean. See https://www.ciat.org/precios-transferencia/

Fiscal years	Adjustment to the tax base (millions of Argentine pesos)	Adjustment to the tax base (millions of US Dollars)
2015	938	71.93
2016	1,244	78.29
2017	1,345	72.12
2018	5,260	139.52
2019	9,693	161.85
2020	10,398	123.57
2021	12,839	124.99

Source: Elaborated by the author based on AFIP's statistics (see https://www.afip.gob.ar/operacionesinternacionales/documentos/Estadisticas_ajustes_autodeclarados.pdf*)*

Note: Official quote of foreign Exchange at 31st December each year was used even when fiscal years could have ended at any moment during the year.

However, it is unclear whether such additional revenue is sustainable (Picciotto, 2016: 21). Sustainability in the long run is necessarily dependent on international co-operation.

International co-operation has grown immensely through the implementation of automatic EOI (Grondona & Barreiros Cavaco, 2022), but also through the implementation of other forms of co-operation such as the OECD's International Compliance Assurance Programme (ICAP) or the Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC). The first of these, ICAP, is a voluntary multilateral programme, taking a public-private hybrid form, as it consists of a co-operation between MNEs and a set of tax administrations, by which the latter performs a risk analysis of the MNEs and produces a non-binding communication of the results of such analysis to the MNEs participating in the programme. The JITSIC programme consists of an EOI among tax administrations on practical cases of harmful structures affecting more than one country in a joint or complementary way.

Even when less flawed and more flexible than in the recent past, such co-operation is still slow and does not solve the structural problems arising from the employment of an inadequate set of norms originating from the ALP and the separate entity criteria.

Moreover, EOI, works well in its different forms (upon request, automatic, spontaneous, as well as through other forms of co-operation such as joint tax audits and simultaneous tax audits) between OECD countries. However, some forms of co-operation (e.g. Exchange of information upon request) are still proportionally significantly reduced in developing countries (OECD, 2022, pág. 17).

The Solutions Proposed in the International Framework and the Growing Influence of Unitary Taxation Proposals[17]

[17] A large part of this section has been taken from (Ovonji-Odida, Grondona, & Chowdhary, 2022).

In 1998, the OECD's Harmful Tax Competition initiative was initially aimed at tackling low and null tax jurisdictions and those offering preferential tax regimes[18]. However, it was soon weakened and refocused on a programme for improving tax information exchange through bilateral treaties (Picciotto, 2016: 11).

In 2012, the G20 leaders at the Mexico meeting declared the need to prevent BEPS, and in particular, they requested the OECD to create instruments that would better align taxing rights with economic activity. In July 2013, the OECD launched the BEPS Action Plan in response to the request made by the G20 Finance Ministers.

However, even while the BEPS Action Plan acknowledged that the objective was for a realignment of taxation with economic substance, it also stated that *'...there is a consensus among governments that moving to a system of formulary apportionment of profits is not a viable way forward...'* (OECD, 2013, pág. 14). The project intended to capture those resources that through different artificial mechanisms are not taxable or are very low taxed, without changing the essence of the distribution of power imposed by the same few (Figueroa, 2014).

G20/OECD's BEPS Action Plan resulted in 15 actions. Although, as highlighted by Picciotto, the general objective of the Action Plan was intended to better align rights to tax and economic activity, in practice, the formulary apportionment was rejected as a solution (2016, pág. 14). The outcome was thus weak, except for the EOI on country-by-country reporting, a minimum standard resulting from Action 13 (Picciotto S. , 2016) (Grondona V. , 2015).

In 2018, a new discussion began at the OECD/G20 IF on BEPS on a "Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy". As stated by Ovonji-Odida, Grondona, & Chowdhary, "*…[T]he Two Pillar solution marks a paradigm shift in international taxation. It has broken new ground in many different aspects of the way MNEs are taxed, such as the introduction of global formulary apportionment, allocation of taxing rights through a multilateral treaty and large-scale multilateral dispute resolution, to name a few. Each of these presents new concepts that tax administrations will have to learn eventually. Nonetheless, the precise framing of the solutions has, for the most part skewed to advantage advanced economies and thus, inordinately benefit rich countries. Path dependency theory suggests that once the initial "building blocks" are laid and solidified, they will be more difficult to change in the future."* (2022)[19] This context presents an opportunity to revisit some of Picciotto's work, to find alternatives to the problems that Pillar 1 and 2 attempt to address.

As previously highlighted, Picciotto has worked on proposals related to unitary taxation and formulary apportionment as a solution to the gap between the location of economic activity and taxation since 1991. He has stressed that it implies a much more rational approach to the national taxation of internationally integrated economic activity, even when strongly rejected

[18] See Akhtar and Grondona (2019) for a description of the multiple listings of tax havens that have been promoted by different intergovernmental organizations.
[19] For a review of the problems of the Two Pillar Solution see also (Grondona V. , 2021) and (Ovonji-Odida, Grondona, & Makwe, 2020).

by international organisations, as such solutions implied the political problem of agreeing on a formula (1991, pág. 223).

Picciotto's work on countries' specific legislation is an example of what can be done in the current framework. This is specifically addressed in his "*International Business Taxation*" book (Picciotto S. , 1992) as well as, more recently, in his recent work on "*Problems with Transfer Pricing and Possibilities for Simplification*" (Picciotto S. , 2018). In the first, Picciotto analyses the UK and US solutions, among others, to international tax avoidance at the time, which, in significant terms, referred to normative changes strengthening their rules on the taxation of residents in the context of their particular legislative frameworks.

In the second, he analyses the solutions implemented by Brazil, Mexico, the Dominican Republic and India. This can be primarily summarised by saying that they propose either simplified benchmarks, safe harbours, and/or advance pricing arrangements for specific industries. Picciotto stresses that national governments, particularly developing countries, have the power to implement simplified methods. However, to what extent countries can apply such methods depends on the freedom of manoeuvre the nation-State has. This is, whether the nation-State has implemented the OECD's TP guidelines or on how extended their treaty network is, since both the guidelines and the tax treaties are based on the ALP and separate entity criteria. So, in cases where there is an existing treaty network, any simplifications devised by Nation-States would have to be compatible with its tax treaties. In particular, articles 7 (business profits) and 9 (associated enterprises) of the OECD –or UN- Model Tax Convention. In fact, the cases analysed by Picciotto could be said to be compatible with the ALP (even when some analysts would say it stretches the definition to an extreme).

Once again, and as it was referred to in the first section of this work, the question of the internationalisation of the State comes into the scene. The international agreement and arrangements entered into by States to address the problems of the internationalisation of capital act as a limitation to the sovereignty of national States and to the extent to which unilateral solutions can be implemented.

In any case, both in the 1992 and 2018 work, Picciotto concludes that unilateral solutions, even when possible (with limitations) and undoubtedly advisable, do not entirely solve the problem of the possibilities provided for tax evasion and avoidance in the context of the internationalisation of capital. That is where, once again, unitary taxation comes as a possible solution to the problem.

However, seeing the direction the international discussions on Pillar 1 and 2 (both conceptually based on unitary taxation) have taken, towards solutions that are too complex for implementation and not in the best interest of countries of the Global South; Picciotto, et al, proposed an alternative to Pillar 2 in 2021, a Minimum Effective Tax Rate for Multinationals (METR) (Picciotto, Kadet, Cobham, García-Bernardo, & Janský, 2021).

METR is, in essence, a unilateral solution, as it can be applied under national tax rules and does not need any treaty changes. It follows Pillar 2 or GLOBE's procedure for calculating the effective tax rate by jurisdiction but calculates the share of an MNE's non-effectively taxed profits, allocating them among all countries where the MNE has a taxable presence in a much simpler way than that proposed by Pillar 2. Moreover, the allocated tax base could be taxed at the existent rate in each jurisdiction instead of at the minimum of 15% proposed in Pillar 2. (Picciotto, Kadet, Cobham, García-Bernardo, & Janský, 2021, pág. 864)

However, even when METR presents itself as a good solution, feasible to be implemented by different countries, it does not provide a solution to the problem that Pillar 1 attempts to address, which is the definition of taxable presence. It is still an incomplete solution. Several countries have implemented unilateral solutions for the taxation of the digitalised economy, which constitute, in practice, alternatives to Pillar 1, even when this has created some conflicting situations among countries, as they are based on an extension of the legislation of the national States, which then conflicts with the interests of the residence countries involved, in particular with those of the United States. (Grondona, Chowdhary, & Uribe, 2020) (Amar & Grondona, 2022).

4. CONCLUSIONS

The participation of States in this world system, in the context of the internationalisation of capital, is characterised by competition. Competition among individual capital and competition among States to attract capital. This competition results in lowering taxes and creating tax incentives and arrangements aimed at attracting capital.

As Miguez (2017) has observed, the reproduction of global capital requires the construction of a supranational legality, some kind of internationalisation of the State.

In the context of international business taxation, the OECD's IF on BEPS is the technical body designing today's Pillar 1 and 2 proposals. The discussion on the theories of the State can serve as a framework for understanding the current discussions on international business taxation.

Picciotto has walked this path, developing an extensive body of academic work in relation to the internationalisation of the State, and later in relation to the challenges posed for national States for the taxation of MNEs, the internationalised capital.

The asymmetries between North and South, result in an evident need to create a space where the Global South or the peripheral economies can discuss and propose their own solutions, with equal power and voting rights. This could be possible at the UN, where developing countries can group themselves (in the G24 or G77, for instance). This proposal is in most of Picciotto's scholarly work and part of his legacy.

In the Latin American region, the First Latin American Summit for inclusive global taxation promoted by the government of Colombia was held[20]. This framework, together with support spaces developed in organisations of the Global South, such as the South Centre, contribute to balancing the hegemonic fractions of internationalised capital's influence with geopolitical interests more associated with the Global North.

[20] See https://www.minhacienda.gov.co/webcenter/portal/TributacionIncluyente/pages_TributacionIncluyente/icumbrelatinoamericacaribetributacion

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