

## INTRODUCTION TO THE SYMPOSIUM ON RUTH MASON, “THE TRANSFORMATION OF INTERNATIONAL TAX”

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Historically, international law on the taxation of multinational enterprises (MNEs) was limited, bilateral, and focused on the avoidance of double taxation. The Organisation for Economic Co-Operation and Development (OECD) played a role as a forum for discussion of international tax policy and put forth a Model Tax Convention, but formal international cooperation remained scattered. The situation began to change in 2013 in connection with an OECD/G20 initiative to craft an “Inclusive Framework on Base Erosion and Profit Shifting (BEPS).” In contrast to the various bilateral treaties focused on the avoidance of double or over-taxation, the goal of BEPS is the avoidance of under-taxation, as well as the allocation and coordination of taxing authority across the many jurisdictions with an interest in raising revenue from the taxation of MNEs. The OECD reports that 135 countries are now involved in the project.<sup>1</sup> A number of commentators have downplayed the importance of BEPS, but Ruth Mason of the University of Virginia describes it in *The Transformation of International Tax* as “transformational.”<sup>2</sup> The four contributors to this symposium explore various dimensions of Mason’s “transformation.”

Mason grounds her claim of transformation in three principal aspects of BEPS. First, BEPS expands participation in the formulation of international tax policy beyond the OECD to encompass all interested countries. Second, it embraces what has been called the “single taxation principle,” which seeks to curtail tax planning and avoidance strategies by MNEs and ensure that their income does not escape taxation altogether. Finally, BEPS creates multilateral legal instruments with a variable structure, including some obligations from which participants can opt out, and certain “fiscal fail safes” to ensure that if one state neglects to tax the income of an MNE, another state will.

Mason also emphasizes that the central goal of BEPS—to increase global revenue from the taxation of MNEs—is inevitably accompanied by the challenging problem of allocating taxing authority across the many jurisdictions hungry for revenue. On this front, BEPs has made little progress although negotiations are continuing. It remains to be seen whether agreement on the allocation of revenue can be achieved, and whether it can curtail international conflict such as the current standoff between the United States and Europe over digital services taxation. The danger is that tax policy will devolve into a battle of parochial unilateral policies, embedded within a broader set of parochial policy instruments (such as antitrust and trade) that can also be deployed to capture the rents generated by MNEs.<sup>3</sup>

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<sup>1</sup> See OECD/G20 Inclusive Framework on BEPS, [Progress Report July 2019-July2020](#).

<sup>2</sup> Ruth Mason, *The Transformation of International Tax*, 114 AJIL 353 (2020).

<sup>3</sup> See Joseph Bankman et al., *Collecting the Rent: The Global Battle to Capture MNE Profits*, 72 TAX L. REV. (forthcoming 2020).

With such concerns in mind, Mason is largely agnostic about the normative value of the BEPS project. She doubts that principles of fairness or economic efficiency can light the way to agreement about the allocation of taxing authority, and insists that the ultimate outcome will depend on “politics.” Normative skepticism indeed seems appropriate here, as we have no consensus theory as to the optimal level of MNE taxation in the aggregate much less a theory of how to allocate revenue optimally across jurisdictions.<sup>4</sup> Thus, unlike the situation involving, say, international trade, where trade agreements can yield clear efficiencies from the suppression of protectionism, cooperation on MNE tax policy yields uncertain benefits and the revenue allocation problem may be, in substantial measure, a zero-sum game.

Reuven Avi-Yonah of the University of Michigan offers a favorable normative take on the BEPS project, premised on the belief that governments need more revenue and that the taxation of MNEs may simply capture “rents” and avoid distorting economic activity.<sup>5</sup> He views many of the provisions contained in the U.S. Tax Cuts and Jobs Act of 2017 as a response to the principles developed in BEPS in pursuit of the single taxation principle. Likewise, he views the ongoing developments in BEPS (so-called BEPS 2) as a response to the 2017 changes in U.S. law, suggesting that BEPS 2 “globalizes” some of the core components of U.S. law, along with an initiative aimed at ensuring adequate taxation of digital services. He thus pushes back on a narrative that the United States has been largely on the sidelines during the BEPS project, in favor of showing how BEPS and U.S. law exhibit constructive interaction.

Wei Cui of the University of British Columbia offers a more skeptical take on both the practical significance and the normative appeal of the BEPS project.<sup>6</sup> He argues that international tax norms have largely been shaped by the unilateral policies of the United States, and that the issues ostensibly requiring international cooperation (fear of double taxation and a commitment to single taxation) can and to an extent have been addressed through unilateral policies (such as the allowance of deductions for taxes paid abroad and the 2017 changes in U.S. law). Accordingly, he questions whether there is a central role for international cooperation in the tax arena: “What are the externalities of unilateral actions that must be addressed, and that countries are willing to address, through cooperation?” He also suggests that BEPS is less “transformational” as a positive matter than Mason claims.

Lilian Faulhaber of Georgetown University offers a public choice perspective on the BEPS project.<sup>7</sup> She cautions against viewing the national representatives to BEPS negotiations as faithful agents of the national interest. Instead she argues that partisan cleavages are evident from one national administration to another, and that corporate interest groups also play a starring role. She further notes that international negotiations can give political cover to national representatives pursuing an agenda that cannot be achieved through domestic legislation alone. Related to this, and as a point of considerable emphasis, Faulhaber contends that nascent proposals for changes in domestic law can achieve the necessary domestic political support as a consequence of their embodiment in international instruments or proposals—a process she terms “international legitimation,” of which she offers several examples.

Finally, Wolfgang Alschner of the University of Ottawa undertakes to draw broader lessons from recent developments in international taxation for the future of international cooperation on other matters such as trade.<sup>8</sup> He

<sup>4</sup> Indeed, many economists remain of the view that the optimal tax rate on capital income is zero or close to it. For a non-technical survey of the economic literature on these issues, see N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSP. 147 (2009).

<sup>5</sup> Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and The United States*, 114 AJIL UNBOUND 255 (2020).

<sup>6</sup> Wei Cui, *What is Unilateralism in International Taxation?*, 114 AJIL UNBOUND 260 (2020).

<sup>7</sup> Lilian V. Faulhaber, *Diverse Interests and International Legitimation: Public Choice Theory and the Politics of International Tax*, 114 AJIL UNBOUND 265 (2020).

<sup>8</sup> Wolfgang Alschner, *Shifting Design Paradigms: Why Tomorrow's International Economic Law May Look More Like the Tax Regime than the WTO*, 114 AJIL UNBOUND 270 (2020).

notes the recent challenges facing the World Trade Organization (WTO), including the breakdown of the Doha Round of negotiations and the partial stasis of the dispute settlement system due to the refusal of the United States to approve Appellate Body judges. He then offers the BEPS Multilateral Instrument as a possible model for future progress on negotiations, whereby some commitments are universal but some allow opt-out by objectors, much like the various plurilateral codes under the General Agreement on Tariffs and Trade that were replaced by the single undertaking that created the WTO. With regard to dispute resolution, he suggests that the transparency and peer review process of BEPS might serve as an alternative to formal adjudication in disputes over trade remedies.

Collectively, these contributions expand on Mason's analysis by examining the nature, degree, and potential significance of the transformation of international cooperation on the taxation of MNEs. Whether that cooperation can fruitfully contribute to the enhancement of global welfare and to the avoidance of destructive tax competition over the allocation of tax revenue remains to be seen.